88-1359

No. ———

Supreme Court, U.S.
FILED
FEB 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TENLEY AND CLEVELAND PARK
EMERGENCY COMMITTEE,
Petitioner

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

TENLEY AND CLEVELAND PARK
EMERGENCY COMMITTEE, *et al.*,
Petitioners

v.

DISTRICT OF COLUMBIA, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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FEBRUARY 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Mayor of the District of Columbia exceeded his Congressionally-delegated authority by permitting private development to proceed in violation of the District's enacted Comprehensive Plan, when the Home Rule Act, under which Congress delegated its exclusive power over the seat of the Federal government, expressly requires the Mayor to prepare and implement that Plan?

PARTIES TO THE PROCEEDING

The petitioners are the Tenley and Cleveland Park Emergency Committee and Advisory Neighborhood Commissioner Philip Mendelson. The respondents are the District of Columbia Board of Zoning Adjustment, the District of Columbia, Carol Thompson for the D.C. Department of Consumer and Regulatory Affairs and John Touchstone as the Director of the D.C. Department of Public Works. Intervenor/respondent is 4000 Wisconsin Avenue Associates Limited Partnership.

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v.

DISTRICT OF COLUMBIA, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

The Tenley and Cleveland Park Emergency Committee, *et al.*, petition for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-25a) is reported at 530 A.2d 331 (D.C. App. 1988). The June 26, 1987 order consolidating the Superior Court and

Board of Zoning Adjustment decisions (App., *infra*, 26a-27a), and the decisions of the Superior Court (App., *infra*, 28a-44a) and Board of Zoning Adjustment (App., *infra*, 45a-52a) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered November 17, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 203(a), 423 and 492 of the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973), *reprinted in* 1 D.C. Code 175 (1981) (Home Rule Act), and D.C. Code section 1-245 are reproduced at App., *infra*, 53a-59a.

STATEMENT

This case concerns the failure of the District of Columbia to carry out an important component of the obligations which it assumed in accepting Congress's delegation of its exclusive Constitutional authority to govern the Nation's capital. That delegation, contained in the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973), *reprinted in* D.C. Code 1, 175 (1981), requires the District of Columbia to ensure, as an element of self-government, that future growth in Washington, D.C., would adhere to an effective Comprehensive Plan covering, among other things, land use in Washington, D.C.

The Home Rule Act emphasizes that the District of Columbia Comprehensive Plan must be enacted into law and implemented, and it expressly holds the Mayor responsible for its implementation. The Act's legislative history makes clear that the enacted Plan will control private real estate development in the District, irrespective of zoning.

Actions of the District are seriously compromising achievement of the Congressional objective for orderly development in the National capital. Nine years passed after Home Rule before the Mayor submitted any Plan to the Council. Although the Act specifies that zoning must not be inconsistent with the Plan, four years after the Plan's enactment only limited portions of the city's zoning have been reviewed to correct inconsistencies.

Following enactment of the Plan, intervenor/respondents sought and obtained permits to build a private development at 4000 Wisconsin Avenue, N.W., containing over 400,000 square feet of office space. The proposed building satisfied zoning regulations which predated the Plan, but it conflicted with the enacted Plan's determination that the building's locality should have *limited* office space. The court of appeals upheld the permits on grounds that neither the Home Rule Act nor the enacted Plan require the Mayor to implement the land use provisions of the Plan, in the absence of Zoning Commission action to eliminate inconsistencies between zoning and the Plan.

The Congressional Home Rule delegation granted the Mayor broad authority as chief executive of the District, but it coupled his authority with significant responsibilities. By exercising his Home Rule Act authority without discharging the correlative responsibilities, the Mayor has taken that authority beyond the controls which Congress built into the delegation. The lethargic pace of planning and rezoning in the District, coupled with the substantial new construction which continues to occur, mean that the court's erroneous ruling, if not reversed, will allow the Mayor to frustrate achievement, in many parts of the Capital city, of the Plan implementation requirement that was an intrinsic part of the Congressionally-devised system.

1. *Statutory and Regulatory Scheme.* Under the United States Constitution, the U.S. Congress has exclu-

sive authority to govern the District of Columbia. Art. 1, § 8, Cl. 17. With the Home Rule Act, *supra*, Congress delegated a portion of that authority to a locally-elected District government. The delegation reflects Congress's careful delineation of the nature of government that it envisioned for the city. Meaningful local planning was an important component of that vision: in a substantial change from the prior system in the District, Congress designated the Mayor himself as the central planning agency for the District and held him responsible for "the preparation *and implementation* of the District's elements of the comprehensive plan for the national Capital . . . ." § 203(a), amending 1 D.C. Code § 1-1002(a)(2) (now D.C. Code § 1-2002(a)(2)), and § 423(a) (codified at D.C. Code § 1-244) (emphasis added). It required the Mayor to prepare and submit District elements of the Plan to the Council of the District for "adoption by act." §§ 203(a), amending 1 D.C. Code § 1-1002(a)(3), and 423(b). The Home Rule Act charges the Mayor, as chief executive, with the "proper execution of all laws relating to the District." § 422. In addition, it specifically holds him responsible for implementation of the Plan. §§ 203(a) and § 423.

To protect the Federal interest from the possibility of unwise local planning decisions, Congress required the Council, "prior to implementation," to submit enacted District Plan elements to the National Capital Planning Commission (NCPC) for review. §§ 203(a), amending 1 D.C. Code § 1-1002(a)(3), and 423(b). The Home Rule Act specifies that if a District element is not satisfactory to NCPC "it shall not be implemented," but if NCPC does not object, the element "shall be incorporated into the comprehensive plan for the National Capital and shall be implemented." § 203(a), amending 1 D.C. Code § 1-1002(a)(4)(A)-(C). The Home Rule Act also requires NCPC to "prepare and adopt" Federal Plan elements, § 203(c): the Comprehensive Plan consists of the

combined District and Federal elements. § 203(a), amending 1 D.C. Code § 1002(a)(4)(D). The Home Rule Act also directs that zoning in the District must not be inconsistent with the Comprehensive Plan. § 492, amending D.C. Code § 5-414.

Pre-existing District law, unchanged by the Home Rule Act, provides that zoning regulations in effect as of June 20, 1938, continue in effect until and as they may be amended by the Zoning Commission. D.C. Code § 5-415. Preexisting District law also provides that where another District law or regulation establishes more stringent requirements than those imposed by zoning, the more stringent requirements are controlling. D.C. Code § 5-428.

The Mayor first transmitted District elements of the Plan to the Council September 13, 1983. The Council enacted the first ten elements of the Comprehensive Plan in 1984. D.C. Code § 1-245; District of Columbia Comprehensive Plan Act of 1984, D.C. L. No. 5-76 (1984). (The Plan is published in full at 10 D.C.M.R. §§ 100.1 *et seq.*) At that time, the Council rejected the initial Land Use Element prepared by the Mayor and demanded resubmittal. *See* D.C. Code § 1-246. The Council enacted the revised Land Use Element, effective March 16, 1985. District of Columbia Comprehensive Plan Act of 1984 Land Use Element Amendment Act of 1984, D.C. L. No. 5-187 (1985). The Land Use Act's maps designate the area which includes 4000 Wisconsin as a "Local Neighborhood Center," a category defined as having only "limited office space." Comprehensive Plan, § 1108(b)(1).

2. *Proceedings Below.* Petitioners, a group of community residents, brought suit in the District of Columbia Superior Court to challenge the Mayor's issuance of permits for a project which violated the Comprehensive Plan. The Superior Court did not expressly rule on the Plan but held that since zoning had not been revised to reflect the Plan, petitioners had failed to exhaust their

administrative remedies before the Board of Zoning Adjustment (BZA) or the Zoning Commission. D.C. Super. Ct. Civil Action No. 2251-86, April 10, 1986, Motion to Amend Judgment or for a New Trial denied, May 19, 1986 (unreported). Petitioners had also initiated a protective action seeking BZA review of the building permit. That agency dismissed the action on grounds that it had no jurisdiction to consider petitioners' claims regarding the Comprehensive Plan. BZA Ap'l. No. 14424, Decision May 28, 1986, Final Order April 10, 1987. On the consolidated appeal, the Court of Appeals decided that the Home Rule Act did not intend the District's Plan to displace existing zoning (App., *infra*, 10a-11a) and that the Comprehensive Plan as enacted did not impose limits on individual real estate development projects that complied with that zoning. (*Id.* at 19a-20a.) The Court concluded that in not seeking an emergency rezoning as soon as the Comprehensive Plan was enacted, petitioners had failed to exhaust administrative remedies. (*Id.* at 22a.)

The Court of Appeal's decision did not acknowledge the Home Rule Act's planning provisions which unconditionally require implementation following NCPC review. *See* § 203(a). Neither did it analyse the language of the Act that assigns direct Plan implementation responsibility to the Mayor, not simply to the District's Zoning Commission, which is an independent agency. The Court also ignored pertinent legislative history that specifically states that the Plan will control private development irrespective of zoning. The decision recognized that the Home Rule Act "fundamentally altered the way in which future planning decisions would be made in the nation's capital." (App., *infra*, 8a.) It also recognized that Congress specifically intended to overturn a relevant prior District decision, *Citizens Ass'n of Georgetown v. Zoning Comm'n.*, 155 U.S. App. D.C. 233, 477 F.2d 402 (1973), (*Georgetown II*) which had upheld a project that satisfied zoning but not the then-applicable plan. (App., *infra*,

9a.) It nonetheless concluded that the Act's approach to zoning showed that the Plan had no effect until rezonings were completed.

Having decided that the Home Rule Act did not require direct Plan implementation, the Court of Appeals then examined the Plan enacted by the Council. Citing selected portions of the Plan and its legislative history, the Court ruled that the Plan "was not self-executing and did not automatically impose a moratorium" on construction authorized by preexisting zoning. (App., *infra*, 20a.)

REASONS FOR GRANTING THE PETITION

The 1974 Home Rule Act, *supra*, embodies Congress's carefully crafted system for the government of the Nation's capital. In delegating its exclusive, Constitutional authority over the "Seat of the Government of the United States," Art. 1, § 8, Cl. 17, Congress made it clear that meaningful comprehensive planning must be an important component of the system:

> The Committee believes that a comprehensive plan for the Nation's capital is fundamental to good municipal planning for the National Capital. *H. Rept. No. 93-482*, 93d Cong., 1st Sess. (1983), at 7.

The Congressional decision to assign planning duties directly to the Mayor and City Council, not merely to NCPC, the Zoning Commission or a new planning agency, evidences this importance, as does its further specific direction that the Mayor is responsible for "the preparation *and implementation*" of the Plan. §§ 203(a) and 423 (emphasis added), *see also* § 422. A principal mechanism for achieving implementation of the Land Use Act portion of the Plan lies in the District's regulatory authority over private real estate development in the city: under the Home Rule Act, the Mayor must implement the Plan by rejecting permit applications for projects which would violate it.

The Court of Appeals decision upholding the Mayor's failure to implement the Plan erred:

> (1) in misreading the Home Rule Act and failing to examine highly relevant legislative history;
>
> (2) in dismissing the Act's broad Plan implementation requirements on the basis of provisions relating more narrowly to zoning and claiming that Plan implementation would create a building moratorium;
>
> (3) in charging the citizens instead of the Mayor with responsibility under Home Rule to assure Plan implementation;
>
> (4) in misreading the Plan itself, and
>
> (5) in expanding the Mayor's authority beyond the terms of the Congressional delegation by creating an unwritten exception to the Mayor's express obligation to implement the Plan.

Since the 4000 Wisconsin building may remain in place for many decades, the decision has allowed the Mayor, rather than implementing the Plan, to render implementation impossible in the area.

Washington has long been a planned city of open spaces and moderate sized buildings that respect the character of their surroundings. Congress attempted to assure, through careful, high level plan preparation and implementation, that the Capital city would continue to be a model for the Nation. Under the Court of Appeals's erroneous decision, the Mayor may knowingly permit Plan violations throughout Washington, D.C. For these reasons, the case concerns a matter of substantial importance that warrants this Court's review.

1.a. The express provisions of the Home Rule Act repeatedly emphasize Congress's intent that the Comprehensive Plan must be implemented and that the Mayor is responsible for its implementation. *See* §§ 203 and 423. The District's "business as usual" approach to re-

viewing a private real estate development permit application following passage of the Land Use Act is a clear breach of the Mayor's implementation responsibility under the system of government imposed by the Congressional delegation of authority.

b. The legislative history of the Home Rule Act (*Legislative History of the District of Columbia Self-Government and Governmental Reorganization Act*, Serial No. S-4, 93d Cong., 2d Sess. (1984) ("*Legis. His.*") confirms that the Act bars construction which would violate the Plan. Representative Brock Adams [1] explained that the Act's planning provisions grew out of events which had occurred in Georgetown during the prior decade:

> . . . Now what happened in Georgetown with the high rise on the waterfront is that the waterfront is zoned from an old time industrial use, which would permit high rise. The NCPC came and said no, it should be a historical monument. But when the case went to court, the court held that the comprehensive plan did not have to be followed, that the zoning was to be followed. I am paraphrasing that very briefly. And the National Capital Planning Commission's recommendation was, to us, that *from now on the comprehensive plan has to be followed regardless of what the zoning might be for it.*
>
> *I know it is complicated but does that explain to you how they interact?* (*Legis. His.* at 1021; emphasis added.)

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[1] Rep. Adams was a floor manager of the Home Rule Act bill and Chairman of the Subcommittee on Government Operations of the House Committee on the District of Columbia, which drafted the Home Rule Act. *See Citizens Ass'n of Georgetown v. Zoning Comm'n*, 392 A.2d 1027 (1978) ("*Georgetown III*"), at 1034, n.14, and accompanying text. To determine the intent of Congress, the courts will look primarily at the statements of the supporters of the final legislation. *See, e.g., American Frozen Food Institute v. Train*, 539 F.2d 107, 124 (D.C. Cir. 1976).

Representative Adams's statement focusses clearly on the specific issue presented in this case: whether zoning or the Plan should prevail when the Plan is more restrictive. The statement shows beyond question Congress's intent that in such a case the Plan should be followed. The Court of Appeals erred in failing to address that directly relevant explanation, and its error seriously weakens the effectiveness of the Congressionally-mandated planning for the District.

2. The Court of Appeals's mistaken result was caused by its attempt to determine the effect of the Home Rule Act's Comprehensive Plan requirements by relying instead on the Act's provisions directed solely to zoning.

a. The Home Rule Act's stipulation that the District's zoning must not be inconsistent with the Plan (§ 492, amending D.C. Code § 5-414) does not, as the Court believed, define the overall effect of the Plan. Instead, it simply serves to force the independent Zoning Commission, as well as the Mayor, to carry out its duties in keeping with the Plan. As Rep. Adams explained:

> . . . [T]his is, of course, why this Bill has to be intertwined—when you change the National Capital Planning Commission, and you change the Municipal Planning Agency of the City, you must also change the zoning laws here by which the day-to-day zoning of property is made to say, in effect, that the zoning laws of the city must conform with the comprehensive plan . . . . *Legis. His.* at 1019.

The court's conclusion that a Zoning Commission initiative is necessary before the land use provisions of the Plan may take effect would mean that Congress expressly held the Mayor responsible for implementing the Plan but placed the only direct power to do so in an independent commission, beyond his control. It is unlikely that Congress would have acted in this illogical fashion.

b. The Court of Appeals also erred in concluding that the ongoing viability of pre-existing zoning, D.C. Code

§ 5-415, elevates that zoning over subsequent Plan requirements. This error is demonstrated by the terms of D.C. Code § 5-428, which the Court failed to discuss. Section 5-428 provides that zoning requirements are superseded by any more stringent requirements of other District laws or regulations.[2] Section 5-428 makes it clear that zoning is a base requirement which all construction must satisfy but not a shield protecting developers from other applicable District requirements. The Court's misreading of D.C. Code § 5-415 allows the Mayor to ignore § 5-428 in the context of the Plan law.

The Court's view that the Zoning Commission's exclusive power to zone, D.C. Code § 5-412, precludes any sort of land use control by the Council reveals a fundamental misunderstanding of the role of planning in directing a city's growth. Planning and zoning are not synonymous. Authorities have likened comprehensive plans to constitutions, at the top of the hierarchy of State land use control laws, with zoning and individual controls all subject to the overriding plan. *See, e.g., Baker v. City of Milwaukie*, 271 Ore. 500, 533 P.2d 772, 775 (1975). Reflecting the Plan in construction permits does not nullify the zoning; instead, it implements a distinct, independent requirement of District law.

Some form of coherent, comprehensive planning is, indeed, a constitutional imperative for valid zoning.[3] Even prior to Home Rule, District law required zoning to be "in accordance with a comprehensive plan." D.C. Code § 5-414 (1973), *see, e.g., Georgetown II, supra* 6, *see*

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[2] Section 5-428 derives from the *Standard State Zoning Enabling Act*, U.S. Dep't of Commerce (1926) § 9. *See* n.4, *infra*.

[3] *See*, 1 Rathkopf, *The Law of Zoning and Planning* (1988), § 12.03[2], and § 4.05-31, quoting Bettman, "Constitutionality of Zoning," 37 *Harv. L. Rev.* 844 (1924): "[I]t is the comprehensiveness which puts the 'reason' into 'reasonableness.'" *See also*, Udell *v. Haas*, 288 N.Y.S. 2d 888 at 894, 21 N.Y.2d 463 at 469-470, 235 N.E.2d 897 at 901 (N.Y. Ct. App. 1968).

also App., *infra*, 9a.[4] In replacing the "in accordance with a plan" terminology with a new "not inconsistent with the plan"[5] requirement, Congress removed the planning power from the Zoning Commission and assigned it to the elected Mayor and City Council. It thereby relegated the Commission to revising its technical requirements to eliminate inconsistencies with the Plan or to carry out the other objectives listed in § 5-414. Section 5-412 states the truism that zoning remains in effect until revised: it does not operate to authorize the Mayor to allow violations of his own newly enacted Plan on the basis of less stringent preexisting regulations which had been promulgated pursuant to the Zoning Commission's superseded and outdated planning views.[6]

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[4] The "in accordance with a plan" language derives from *The Standard State Zoning Enabling Act, op. cit. supra* n.2, § 3. Most states adopted similar language. *See*, 1 Williams *American Land Planning Law* (1974 and Supp. 1988) §§ 18.01-18.02, 18.05.

[5] In states which have adopted a zoning consistency requirement, not only zoning but also other land use controls are generally required to follow the Plan. Rathkopf, *op. cit. supra* n.3, at 12-15 and § 12.04[2], and Hagman and Juergensmeyer, *Urban Planning and Land Development and Control Law* (2d ed. 1986) at 23. Of course, the exact impact of a state "consistency" requirement depends on the terms of the specific controlling legislation.

[6] The District of Columbia's 1958 zoning, which formed the basis for the permit at 4000 Wisconsin, was premised on planning assumptions including population growth which did not occur, a highway network which was not completed, and a philosophy which called for dispersing commercial development outside of the center city to facilitate Washington's evacuation in the event of nuclear attack. *See*, Lewis, *A New Zoning Plan for the District of Columbia*, Nov. 9, 1956. The new Comprehensive Plan is based on updated information and rejects the prior philosophy in favor of directing development to the center city and preserving stable, functioning neighborhoods. §§ 101.1 and 101.3. Following the issuance of the permit for 4000 Wisconsin, the Zoning Commission revised the zoning for the area, in part to satisfy the Plan. *See* Zoning Case 86-17, Z.C. Order No. 530 (Sept. 15, 1988). The building is a nonconforming structure under the new, more restrictive zoning.

c. The Court of Appeals mischaracterized Petitioners' argument as a claim that "any inconsistency between the Plan and existing zoning would impose a moratorium on private real estate development to the extent of the inconsistency." (App., *infra*, 10a; *see also id.* at 2a, 3a, 11a, 14a, 16a, 18a and 20a.) However, adherence to the enacted Plan is no more a "moratorium" to the extent of zoning than is zoning a moratorium to the extent it curtails unlimited development.[7] In both cases owners may construct to the limits authorized by applicable law or regulation but are restrained from construction which has been determined, in one case by the Zoning Commission, in the other, by the City Council, to exceed desirable limits duly established for a given area.

Indeed, implementation of a well-designed Plan may be a city's best assurance against the draconian measure of an across-the-board moratorium. Cities have imposed moratoria precisely because the absence of adequate planning has left them unprotected from excessive development.[8] If an enacted Plan is ineffective unless and

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[7] The use of zoning to restrict land uses has long been upheld. *See, Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

[8] In *Georgetown III, supra* n.1, a citizens action directed against the Zoning Commission's failure to rezone after the Home Rule Act but before enactment of the Comprehensive Plan, Associate Judge Nebeker, concurring in the result, remarked:

> I am not certain that a zoning moratorium would not serve the very useful purpose of assuring prompt compliance with the Congressional mandate that the District adopt a comprehensive plan so that the Commission's adoption (and our review) of zoning decisions would be informed by definite legislative expressions of policy. 392 A.2d at 1044.

Under the Court of Appeals ruling, even after Plan enactment the city's land use regulatory decisions need not be "informed by definite legislative expressions of policy." *Ibid. See generally,* Hagman and Juergensmeyer, *op. cit. supra* n.5, § 9.5.

until it is reflected in revised zoning, the District of Columbia remains at risk during the possibly lengthy period required to attain adequate rezoning citywide, and that creates the setting for such pre-emptive actions as "emergency" (pre-hearing) rezonings or moratoria.

3. Congress assigned the burden of Plan implementation to the Mayor, not the citizens. The Court of Appeals, in finding that the Plan was ineffective at 4000 Wisconsin because citizens failed to exhaust the supposed administrative remedy of seeking an emergency rezoning, relieved the Mayor of responsibility for the Plan's violation and faulted the citizens instead.

a. It is not reasonable that District citizens who object to a single building should be held responsible for the initiation and substantiation of a rezoning case for an entire zone district. The technical support for rezoning cases is generally complex, expensive and time consuming: the case can become an unequal match pitting inexperienced and under-funded private citizens against savvy developers and their battery of attorneys and experts. As the city's chief executive, the Mayor, not the citizens, should develop and present the case in support of rezoning pursuant to the Plan. In addition, however, Congress clearly intended the Plan to be implemented in *all* new construction, *see* Para. 1, *supra*: Congress could not have intended that by the simple device of delaying the rezoning process, the Mayor could retain power to permit private developments which will stand in violation of the Plan for many decades.[9]

b. Zoning is essentially a legislative function. *See* 1 Rathkopf, *op. cit. supra* n. 3, § 1.01[3][b]. The absence of an immediate citizen effort to compel the legis-

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[9] The Court of Appeals acknowledged the City Council's conclusion that, ". . . the Mayor generally had not made satisfactory progress in implementing the District elements of the Comprehensive Plan. . . ." App., *infra*, 18a.

lative act of rezoning in no way constitutes a failure to exhaust *administrative* remedies. *See*, Note, "Exhausting Administrative and Legislative Remedies in Zoning Cases," 48 *Tul. L. Rev.* 665, 673-681 (1974).

c. Even if the citizens had tried to secure timely rezoning, their chances for success were slight. Since the developers applied for their permits shortly after the Land Use Act was passed,[10] "emergency" rezoning would have been needed. At the time, the citizens had little basis with which to urge the Commission to exercise its discretion to take emergency action:[11] the Plan had just been enacted, and the Commission could justifiably postpone action for a time to identify and schedule needed rezoning efforts.[12] If, as seems likely, the Commission had found no basis for emergency action, the citizens would have had the difficult task of obtaining reversal under the "arbitrary and capricious" standard for reviewing agency action under the D.C. Administrative Procedure Act. *See*, D.C. Code § 1-1510. These considerations demonstrate that the relief which the Court of Appeals suggested to petitioners was illusory.

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[10] The Land Use Act took effect March 16, 1985. The developers filed a preliminary permit application on May 24, 1985, and a final application December 4, 1985. Superior Ct. Ex. A, and Record 207-209, *see* App., *infra*, 3a-4a and 21a, n.19. It is highly unlikely that the Zoning Commission could have completed a rezoning within that time.

[11] The citizens had asked the developer its intentions for the site, but the developer repeatedly denied that any plans were ready for review—even after it had filed completed blueprints with the city. *See* Superior Ct. Supp'l. Record, Ct. Transcript 10, 17-18 and 135 and Ex. E, Ct. Record 231, and BZA Transcript 131, 238-239 and 648-649.

[12] The Court of Appeals recognized that:

> . . . the process of reviewing existing zoning regulations for consistency with the Comprehensive Plan would be a time-consuming, deliberative process, . . . although the Council may have anticipated that the conforming process would commence more quickly than it did . . . . (App., *infra*, 20a.)

4. The Court of Appeals's selective, limited reading of the Plan as enacted by the Council caused it to misapprehend the effect of the Plan. The Court recited that § 102 of the Plan provides that the District elements of the Plan are a guide to establish "broad policies and goals while affording flexibility for future implementation and are not binding policy directives" (*see* App., *infra*, 11a-12a), but it failed to discuss the fact that the provision applies "*except* . . . as specifically provided by the District elements of the Plan itself. . . ." It also quoted § 1101(k) (App., *infra*, 12a), which states:

> The Land Use Element does not identify or fix every use, height, and density on every block in the District. The text and maps construct a guiding framework within which public and private land use and zoning decisions are to be made."

This provision does not support the court's conclusion but instead expressly states that private land use *and* zoning decisions must be made within the Plan's framework. The Court next mentioned § 1134 as including the public action goals "to improve enforcement of land use regulations [and] to establish procedures for monitoring public *and private* land use actions for consistency with the policies of the Plan. . . ." (App., *infra*, 12a; emphasis added.) Although the decision then referred to the public action policy of § 1135(5), which calls for reviewing the zoning regulations and developing a program to recommend required changes (*see* App., *infra*, 13a), it failed to make any reference to § 1135(2), which states the following independent public action policy:

> Ensure that proposed land use actions are not inconsistent with the Plan . . . and develop procedures and mechanisms to make such determinations in a timely manner.

Thus, more careful reading of the Plan indicates that the Council contemplated that the Plan would compel not only needed rezonings but also executive branch ac-

tions to assure that private land use decisions, such as new construction, will comply with the Plan.

The Court of Appeals's review of the Plan Acts' legislative histories (Report of the Committee of the Whole on Bill 5-292, District of Columbia Comprehensive Plan Act of 1984 (Jan. 17, 1984) (Comprehensive Plan Act Committee Report) and Report of the Committee of the Whole on Bill 5-507, District of Columbia Comprehensive Plan Act of 1984 Land Use Element Amendment Act of 1984 (1984) (Land Use Act Committee Report)) was similarly narrow. The Court entirely disregarded telling portions of the legislative history. For instance, the Comprehensive Plan Act Committee Report cautions that District agencies' flexibility as to the means of implementing the Plan must be exercised within the bounds of the Plan:

> General directions, to be developed in greater detail and specificity when particular projects are proposed, are presented for all to understand. The . . . Plan provides overall guidance *and establishes overall limits.* (Comprehensive Plan Act Committee Report at 8; emphasis added.)

The report continues, p. 10:

> . . . The Plan will be implemented on a cumulative basis through the actions and decisions of *the Mayor* and Council, *District departments and agencies*, public utilities, *private land owners and developers*, individual citizens, *the Zoning Commission* and other independent and quasi-independent boards, commissions, and agencies which operate within the District.
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> * * * *
>
> Collective actions will ensure, over time, successful implementation of the Plan. (Emphasis added.)

The report explains, p. 10:

> The Comprehensive Plan for the National Capital is not simply a blueprint for a better tomorrow to be acted upon some time in the distant future. *It provides a basis for making necessary decisions in the*

> *present*, to ensure the better tomorrow which is planned for, needed, and wanted today. (Emphasis added.)

The Court of Appeals made no reference to any of these strong statements of the Council's intent.

The Land Use Act Committee Report reiterates that all agencies of District government, not simply the Zoning Commission, are expected to participate in Plan implementation:

> Like other District elements, the Land Use element establishes policies to guide future public decisions. The District elements do not impose specific implementation techniques. *This task is the responsibility of the various agencies charged with regulatory authority.* (Land Use Act Committee Report at 4, emphasis added.)

The Court set forth this text *verbatim* but continued to assert that the Plan had no immediate effect. (App., *infra*, 16a.) The court's refusal to accept the clear import of the Plan and its legislative histories leaves Washington without the full protection intended by the Council and the Congress.

b. The Plan and legislative history provisions set forth in paragraph 4.a., above, demonstrate that the Court of Appeals's determination against Plan effectiveness was, at best, uncertain. To the extent that other provisions suggest that the Plan's impact is ambiguous, the Court should have read the Plan to uphold its legitimacy: the Congress intended the Plan to control development, *see* Para. 1, *supra*: the Court should have resolved any ambiguity to find that the Council had carried out the Congressional intent. Indeed, the Council itself believed that it had done so (Land Use Act Committee Report, 4):

> By adopting the Land Use Element as the 11th District element of the Plan, Bill 5-507 fulfills the Congressional mandate to adopt a Comprehensive Plan for the National Capital.

In the alternative, if the Plan does not require direct implementation by the executive branch, then the Council failed to enact the document required by Congress, and the Court should have so ruled.

5. Washington, D.C. has been a planned city ever since 1791, when President Washington sent Pierre L'Enfant's original scheme for the capital to the Congress as a "delineation of a grand plan for the local distribution of the city." Haar, *Land-Use Planning*, Little, Brown & Co., (1976) at 48, n. 14. Professor Haar states, *ibid.*:

> Inevitably, the design of a nation's capital captures the attention of planners; a capital reflects the culture, resources, and achievements of the people which it represents. The plans for Washington are the basis of city planning in the United States. . . .

In 1974, when Congress delegated its Constitutional control over the capital to local officials, it sought to honor and preserve that long tradition. It therefore gave local officials substantial but not unlimited leeway over the city's development. It allowed the Mayor to prepare the local elements of the city's Comprehensive Plan, but it demanded that once the Plan was enacted, it would be carried out. The Court of Appeals has erroneously expanded the Mayor's Home Rule Act authority beyond that conferred by Congress, by establishing an unwritten and unwarranted exception to the Mayor's expressed Congressional mandate to implement the Comprehensive Plan for the National Capital.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 1989

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APPENDICES

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 87-468, 86-813

TENLEY AND CLEVELAND PARK EMERGENCY COMMITTEE, *et al.*,
Petitioners,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT,
Respondent.

TENLEY AND CLEVELAND PARK EMERGENCY COMMITTEE, *et al.*,
Appellants,

v.

DISTRICT OF COLUMBIA, *et al.*,
Appellees.

Argued July 5, 1988

Decided Nov. 17, 1988

Brian W. Smith and Diane L. Olsson, with whom Philip C. Olsson, and Nathalie V. Black, Washington, D.C., were on the brief, for appellants/petitioners.

Whayne S. Quin, with whom C. Francis Murphy, Louis P. Robbins, and John T. Epting, Washington, D.C., were on the brief, for appellees/intervenors/respondents 4000 Wisconsin Avenue Associates, et al.

Lutz Alexander Prager, Asst. Deputy Corp. Counsel, with whom Frederick D. Cooke, Jr., Acting Corp. Counsel at the time the memorandum was filed, and Charles L. Reischel, Deputy Corp. Counsel, Washington, D.C., submitted a memorandum in lieu of brief for appellee District of Columbia.

Before ROGERS, Chief Judge,* MACK, Associate Judge, and PRYOR,** Senior Judge.

ROGERS, Chief Judge:

The principal issue presented in these consolidated appeals is whether the District of Columbia Self Government Act and the District of Columbia Comprehensive Plan Act of 1984 impose a moratorium on private real estate development permitted as a matter of right under the applicable zoning regulations where those regulations may be inconsistent with the District's Comprehensive Plan. Appellants Tenley and Cleveland Park Emergency Committee ("TACPEC") and Philip Mendelson appeal from a decision of the Superior Court dismissing their complaint challenging the issuance and validity of the building permit for a project located at 4000 Wisconsin Avenue, N.W. on the ground that they had failed to exhaust available administrative remedies before either the District of Columbia Zoning Commission or the Board of Zoning Adjustment (BZA). They also contend that the trial court erred in ruling that the Advisory Neighborhood Commission (ANC) 3-C received actual and statutory notice, to which it was entitled under D.C. Code § 1-261(c) (1987 Repl.), prior to the issuance of the building permit. They appeal too from the court's denial of a motion to amend the judgment or for a new trial.

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* Judge Rogers was an Associate Judge of this court at the time of argument. Her status changed to Chief Judge on November 1, 1988.

** Judge Pryor was Chief Judge of this court at the time of argument. His status changed to Senior Judge on November 2, 1988.

TACPEC and Mendelson, joined by the North Cleveland Park Citizens' Association,[1] also appeal from a decision of the District of Columbia BZA that it did not have jurisdiction to consider either the status and applicability of the Comprehensive Plan to the Wisconsin Avenue project or whether the notice requirement under D.C. Code § 1-261(c) had been satisfied. They further contend that the BZA's alternative ruling that ANC 3-C received actual and statutory notice is not supported by substantial evidence in the record.

We hold that the Home Rule Act and the Comprehensive Plan do not impose a moratorium on matter of right development and that because the Zoning Commission is the exclusive forum for addressing issues of inconsistency under the Comprehensive Plan, TACPEC failed to exhaust its administrative remedy by not presenting its case to the Zoning Commission. We also hold that ANC 3-C received the notice to which it was entitled under D.C. Code § 1-261(c)(3). Accordingly, we affirm.

I

This appeal involves the validity of a building permit issued to 4000 Wisconsin Avenue Associates[2] ("the developers") by the District of Columbia government for the construction of a large mixed use office-retail project at 4000 Wisconsin Avenue, N.W.[3] By application dated

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[1] For simplicity, we refer to all appellants as TACPEC.

[2] Intervenor/Appellee 4000 Wisconsin Avenue Associates Limited Partnership, the developer of the project, is a partnership comprised of The Donohoe Construction Company and The Holladay Corporation. Other appellees are Carol Thompson for the District of Columbia Department of Consumer and Regulatory Affairs and John Touchstone as the Director of the D.C. Department of Public Works.

[3] The site on which the building is located consists of 4.7 acres at the west side of Wisconsin Avenue, bordering on Upton Street, N.W. and Glover Archbold Parkway, and is the fourth largest build-

May 24, 1985 and filed on June 3, 1985, the developers submitted preliminary plans for the project to the Zoning Administrator for zoning review and approval. Changes and adjustments were made to the plans over the next several months. The developers formally applied to the District of Columbia Department of Consumer and Regulatory Affairs (DCRA) for a permit to build the project on December 4, 1985. The application was included in a list, prepared weekly by the DCRA's Permit and Certificate Issuance Branch, which indicates projects for which applications have been received and permits issued. Pursuant to D.C. Code § 1-261 (1987 Repl.), which requires the District government to provide thirty days written notice of building applications to affected Advisory Neighborhood Commissions (ANCs), the list was mailed to ANC 3-C on December 9, 1985, and received by ANC 3-C Commissioner Philip Mendelson on December 18, 1985.

The thirty-day statutory period for comment by the ANC on the proposed building permit elapsed without the DCRA receiving any recommendations from ANC 3-C. DCRA issued a building permit to the developers on February 19, 1986. At the time the building permit was issued, the zoning regulations applicable to the project site permitted construction of the proposed building as a matter of right.[4] ANC 3-C subsequently wrote letters protesting the issuance of the building permit but by letter dated March 11, 1986, DCRA Director Carol Thompson declined to suspend the permit.

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ing in northwest Washington, and the eighth largest commercial building in the District.

[4] When the building permit was issued, the project site was zoned "C-3-A" which permits medium density mixed commercial development and allows buildings to be erected to a height of 65 feet with a floor area ratio of 2.5. 11 DCMR § 740 (1987). The specifications of the proposed building were within "C-3-A" 's permissible limits. No special exception or variance was sought or required.

On February 28, 1986, TACPEC filed an appeal with the Board of Zoning Adjustment (BZA) challenging the validity of the building permit issued by the DCRA. TACPEC's primary argument was that the building permit was improperly issued because the building would be in violation of the District's Comprehensive Plan.[5] TACPEC also alleged that ANC 3-C had received insufficient notice under D.C. Code § 1-261. The BZA ruled that it did not have jurisdiction over the issue of the alleged inconsistency of the proposed development with the Comprehensive Plan because "[r]esponsibility for comprehensive plan consistency issues is vested in the Zoning Commission."[6] The BZA also concluded that it was without jurisdiction to consider the issue of notice under D.C. Code § 1-261; alternatively, the BZA found that the notice requirements were met.

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[5] TACPEC also challenged permits for excavation, sheeting and shoring and for public space. The BZA correctly ruled that it lacked jurisdiction to address the validity of these permits because they had not been issued by the Zoning Administrator or under the authority of the zoning regulations. *See* 12 DCMR § 107.1(2) (1986); 12 DCMR § 108.2 (1986).

[6] The BZA explained:

> The Zoning Commission for the District of Columbia has the statutory duty to insure that the Zoning Regulations are not inconsistent with the Comprehensive Plan. The Land Use Element of the Comprehensive Plan was enacted in March, 1985, ten years after the installation of the elected Mayor and Council of the District of Columbia. Just as it was reasonable for the Executive and Legislative branches to take the time which they determined to be reasonably required to prepare and adopt the Comprehensive Plan, so also is it reasonable for the Zoning Commission to determine a reasonable schedule for the conduct of its business. The Board may not exercise oversight over the Commission in that respect. Further, the Zoning Commission is the only body which may amend the Zoning Regulations, including those provisions which govern matter-of-right developments.

Overlapping the proceedings before the BZA, TACPEC filed a complaint on March 19, 1986, for declaratory and injunctive relief. TACPEC's complaint alleged that the District government had violated D.C. Code § 1-261 by not providing ANC 3-C with adequate notice of the pending building permit application, thereby depriving ANC 3-C of its statutory right to file written recommendations with respect to the proposed permit.[7] TACPEC also claimed that the District's failure to give ANC 3-C adequate notice of a construction permit application violated the due process clause of the fifth amendment of the U.S. Constitution. TACPEC further alleged that the density of the proposed building violates the Comprehensive Plan for the District of Columbia. The trial court denied the motion for a temporary restraining order, TACPEC withdrew the motion for a preliminary injunction, and a bench trial was held on April 22-24, 1986. The trial court granted the District's motion to dismiss at the close of TACPEC's case. With respect to the validity of the building permit issued by the DCRA, the trial court held that TACPEC had not exhausted its administrative remedies because it had not sought review of that decision before the BZA or the Zoning Commission; the trial court did not decide which was, or if both were, the appropriate agency to provide TACPEC administrative relief. In the alternative, the court held that ANC 3-C received the statutory notice required under D.C. Code § 1-261.[8]

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[7] TACPEC also alleged that the District government failed to provide notice of the applications for excavation, sheeting and shoring permits, and of the May 24, 1985, submission for zoning approval. Although these issues appeared in TACPEC's complaint, no evidence regarding these issues was presented at trial and, therefore, we decline to reach them on appeal. We also do not reach the notice issue with respect to the public space permit which was neither pleaded nor addressed in the trial court. *Williams v. Gerstenfeld*, 514 A.2d 1172, 1177 (D.C. 1986).

[8] The trial court also held that TACPEC had failed to establish its claim that traffic generated by the new building would become

Thereafter the court denied TACPEC's motion to amend the judgment or, in the alternative, for a new trial.

II

TACPEC contends on appeal that the trial court and the BZA both erred in ruling that they were without jurisdiction to adjudicate TACPEC's claim that the building permit for private development at 4000 Wisconsin Avenue, although concededly permitted as a matter of right under the applicable zoning regulations, was invalid as inconsistent with the District's Comprehensive Plan. In its own words, TACPEC claims that "[t]he heart of [its] case is that since the Comprehensive Plan controls land use actions in the District and the challenged permits [see note 5, *supra*] violate the Plan, those permits are illegal, regardless of whether the permitted activity would comply with the zoning regulations." Consideration of the District of Columbia Self-Government Act [9] and the Comprehensive Plan demonstrate that the Comprehensive Plan is not self-executing and does not directly regulate the development of private property in the District of Columbia.[10]

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a public or private nuisance. This issue has not been pursued on appeal. Another claim relating to Department of Public Works permits for paving Glover-Archbold Park and an extension of Upton Street was dismissed as premature. A separate action in Superior Court relating to these permits also resulted in a judgment against TACPEC. *TACPEC v. District of Columbia,* 115 Daily Wash.L. Rptr. 1973 (Sept. 21, 1987). This case is currently on appeal in this court. *TACPEC v. District of Colmubia,* No. 87-604.

[9] The District of Columbia Self-Government and Governmental Reorganization Act, Pub.L. No. 93-198, 87 Stat. 774 (1973), *reprinted in* 1 D.C. Code 175 (1981) (Home Rule Act).

[10] The first step in statutory construction is to examine the language of the statute and to interpret its words according to their plain and ordinary meaning. *United States v. Bailey,* 495 A.2d 756, 760 (D.C. 1985); *Peoples Drug Stores, Inc. v. District of Columbia,* 470 A.2d 751, 754 (D.C. 1983) (en banc). Our primary goal is to

A.

Before Congress enacted the Home Rule Act, land use planning for both the federal and District governments was vested in the National Capital Planning Commission (NCPC). In accordance with the Home Rule Act's purpose to delegate certain governmental powers to the District's newly created local government, the Home Rule Act fundamentally altered the way in which future planning decisions would be made in the nation's capital. The Act mandated, for the first time, the development of a Comprehensive Plan for the District of Columbia, to be created through the joint efforts of NCPC and the District of Columbia government. The Act retained NCPC as the central planning agency for the federal government, but restricted its authority to developing the federal elements of the new Comprehensive Plan and to exercising veto authority within sixty days over those proposed District elements, prepared by the Mayor and approved by the Council of the District of Columbia, that NCPC determined would have a negative impact on the interests or functions of the federal establishment. D.C.

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ascertain and give effect to the intent of the legislative body that drafted the language. *Rosenberg v. United States*, 297 A.2d 763, 765 (D.C. 1972) (quoting *General Motors Acceptance Corp. v. One 1962 Chevrolet Sedan*, 191 A.2d 140, 142 (D.C. 1963)). The statutory meaning of a term must be derived from a consideration of the entire enactment against the backdrop of its policies and objectives. *Carey v. Crane Serv. Co.*, 457 A.2d 1102, 1105 (D.C. 1983) (quoting *Don't Tear It Down v. Pennsylvania Ave. Dev. Corp.*, 206 U.S.App. D.C. 122, 128 642 F.2d 527, 533 (1980)). Even where the words of a statute have superficial clarity, it is appropriate to undertake a review of the legislative history to aid in the ascertainment of legislative intent. *Office of People's Counsel v. Public Serv. Comm'n*, 477 A.2d 1079, 1084 (D.C. 1984) ("words are inexact tools at best") (quoting *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479, 63 S.Ct. 361, 363, 87 L.Ed. 407 (1942)). Finally, the D.C. Council's interpretation of its responsibilities under the Home Rule Act is entitled to great deference. *Marshall v. District of Columbia Rental Hous. Comm'n*, 533 A.2d 1271, 1274 (D.C. 1987); *Yu v. District of Columbia Rental Hous. Comm'n*, 505 A.2d 1310, 1312 (D.C. 1986).

Code §§ 1-2002(a)(2) & (4) (1987 Repl.); *see* Home Rule Act § 203(a). In addition, the Act vested the Mayor with the responsibility for the "coordination of planning activities of the [District] government and the . . . implementation of the District's elements of the comprehensive plan for the National Capital. . . ." D.C. Code § 1-244(a) (1987 Repl.); *see* Home Rule Act § 203(a).

The Home Rule Act also provided for a significant change in the standard governing the Zoning Commission's zoning authority. *See generally Citizens Ass'n v. Zoning Comm'n*, 392 A.2d 1027 (D.C. 1978) (en banc) (*Georgetown III*). Before passage of the Act, D.C. Code § 5-414 (1973) provided that zoning maps and regulations "shall be made in accordance with a comprehensive plan. . . ." In *Citizens Ass'n v. Zoning Comm'n*, 155 U.S. App. D.C. 233, 477 F.2d 402 (1973) (*Georgetown II*), the United States Court of Appeals for the District of Columbia Circuit reaffirmed long standing case law in the District and held that the term "comprehensive plan" was not synonymous with the so-called "Red Book" comprehensive plan that NCPC had developed pursuant to the National Capital Planning Act of 1952, *see* D.C.Code §§ 1-1001 *et seq.* (1973), but only required the Zoning Commission to zone on a uniform and comprehensive basis. *Georgetown II*, *supra*, 155 U.S. App.D.C. at 237-38, 477 F.2d at 406-07. In part to overrule the *Georgetown II* decision, Congress amended the Zoning Enabling Act [11] to provide that "Zoning maps and regulations, and amendments thereto, shall not be inconsistent with the comprehensive plan for the national capital. . . ." D.C. Code § 5-414 (1988 Repl.); *see* Home Rule Act § 492(b)(1).[12] In addition, Congress specifically provided that

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[11] Act of June 20, 1938, 52 Stat. 797, ch. 534, *as amended*, D.C. Code §§ 5-413 *et seq.* (1988 Repl.).

[12] *See also* LEGLISLATIVE HISTORY OF THE DISTRICT OF COLUMBIA SELF-GOVERNMENT AND GOVERNMENTAL REORGANIZATION ACT, S. 1435 (Pub.L. No. 93-198) 93d Cong., 1st Sess. 1677 (Comm. Print 1973)).

"The Zoning Commission shall exercise *all* the powers and perform *all* the duties with respect to zoning in the District as provided by law." D.C. Code § 5-412(e) (1988 Repl.) (emphasis added); *see* Home Rule Act § 492(a). Significantly, for purposes of this appeal, the Home Rule Act left unchanged D.C. Code § 5-415 (1988 Repl.), which provides in relevant part:

> *The regulations* prior to June 20, 1938, adopted by the Zoning Commission under the authority of § 5-412 and *in force on June 20, 1938, including the maps* which at said date accompany and are a part of such regulations, shall be deemed to have been made and adopted and in force under §§ 5-413 to 5-432 and *shall* be and *continue in force* and effect *until* and as they may be *amended by the Zoning Commission* as authorized by said §§ 5-413 to 5-432. The Zoning Commission may from time to time amend the regulations or any of them or the maps or any of them.

Id. (emphasis added). The remainder of section 5-415, also left unrevised by the Home Rule Act, imposes notice and hearing requirements on the Zoning Commission for proposed amendments to the zoning regulations.

Thus, the Home Rule Act explicitly provides that the Zoning Commission is the exclusive agency vested with power to enact zoning regulations for the District of Columbia. TACPEC does not seriously dispute that the Zoning Commission is the sole governmental body entrusted with authority to amend the zoning regulations, but rather contends that once the Comprehensive Plan mandated by the Home Rule Act became law, any inconsistency between it and the existing zoning regulations would serve to impose a moratorium on private real estate development to the extent of the inconsistency. However, the Home Rule Act did not purport to displace existing statutory law which plainly mandates that zoning regulations and maps already in place continue to

have the full force and effect of law until such time as the Zoning Commission shall amend them. D.C. Code § 5-415. Nor does the Comprehensive Plan or its legislative history reflect any intent on behalf of the Council of the District of Columbia to impose a moratorium on development until such time as the existing zoning regulations are conformed by the Zoning Commission to those elements of the Comprehensive Plan with which the zoning regulations are alleged to be inconsistent.

B.

Pursuant to the Home Rule Act, §§ 203(a), 423(a), the D.C. Council enacted the Comprehensive Plan on April 10, 1984. District of Columbia Comprehensive Plan Act of 1984, D.C.L. No. 5-76 (1984) (Comprehensive Plan Act). The Comprehensive Plan Act adopted most of the District Elements of the Comprehensive Plan including those for economic development, housing, environmental protection, transportation, public facilities, urban design, preservation and historic features, the downtown area and human services. *Id.* at 1. The land use element of the Comprehensive Plan, Title XI, was enacted separately on March 16, 1985. District of Columbia Comprehensive Plan Act of 1984 Land Use Element Amendment Act of 1984, D.C.L. No. 5-187 (1985) (Land Use Act). Section 102 of the Comprehensive Plan Act sets forth the manner in which the District Elements of the Comprehensive Plan are to be interpreted and provides in pertinent part:

> Except as specifically provided by other law, including but not limited to An Act Providing for the zoning of the District of Columbia and the regulation of the location, height, bulk, and uses of buildings and other structures and other purposes, as amended . . ., or as specifically provided by the District elements of the Plan itself, the District elements of the Plan are a *guide intended to establish broad policies*

> *and goals* while affording flexibility for future implementation and not binding policy directives. The District elements of the Plan should not be construed as a delegation of authority to establish new programs.

Id. (emphasis added) (citation omitted). With respect to the Land Use element of the Comprehensive Plan, § 1101(k) of the Land Use Act specifically declares that "The Land Use Element does not identify or fix every use, height, and density on every block in the District. The text and the maps construct *a guiding framework* within which public and private land use and zoning decisions are to be made." *Id.* (emphasis added). Section 1134 of the Land Use Act states the Plan's Public Action Objectives, which include the goals "to improve enforcement of land use regulations [and] to establish procedures for monitoring public and private land use actions for consistency with the policies of the Plan. . . ." [13] Among the various policies established in support

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[13] Section 1136 of the Land Use Act provides generally for the adoption of generalized land use maps. Specifically, § 1136 declares that Map 1, which depicts general land use policies, be amended to indicate that the west side of Wisconsin Avenue, N.W., between Rodman Street, N.W., and Van Ness Street, N.W., is included in the moderate density commercial land use category. Land Use Act § 1136(b)(56), The moderate density commercial land use category provides for

> Shopping and service areas that generally provide a much broader range of goods and services are the predominant uses. Chain drug stores and grocery stores as well as branches of department stores, some specialty shops, and personal service establishments may be present.

Land Use Act § 1136(4)(H); *see also id.* § 1107(a)(2). In addition, § 1136 states that Map 3, which depicts generalized commercial, production and technical employment land use policies, be amended to indicate that the area near the intersection of Wisconsin Avenue and Van Ness Street should be a local neighborhood rather than a multi-neighborhood center. Land Use Act § 1136(f)(9). In the Land Use Act commercial center classification scheme, local neigh-

of the Plan's Public Action Objectives, the Land Use Act provides:

> Review the Zoning Regulations of the District of Columbia to determine that they are not inconsistent with provisions of the Plan and, *based upon a zoning program to be developed* by the Office of Planning, recommend required changes including performance standards, text and map amendments, where appropriate, for action by the Zoning Commission for the District of Columbia.

Land Use Act § 1135(5) (emphasis added).

Thus, both the Comprehensive Plan Act and the Land Use Act make clear that the Comprehensive Plan is a broad framework intended to guide the future land use planning decisions for the District. While the Acts acknowledge that existing zoning regulations may be inconsistent in some instances with the policies outlined in the Comprehensive Plan, the Acts explicitly recognize that an examination of existing zoning regulations for conformance with the Comprehensive Plan is necessarily a time-consuming process to be carried out by the Zoning Com-

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borhood centers call for the least intensive development of the three available classifications.

> Local neighborhood centers supply sales of daily groceries, sundries, convenience goods and personal services to neighborhood residents and workers. There is limited parking. Motorists are likely to go to larger concentrations of stores where parking and a greater selection of goods and services are more readily available. A small food and sundries store selling convenience items is usually a principal element of a local neighborhood center. Service stores such as gas stations, carryouts, barber shops, cleaners, diners, and bars also locate in local neighborhood centers. *There is limited office space.* Local neighborhood centers may be further subclassified to identify new centers to be established and existing centers to be upgraded.

Land Use Act § 1108(b)(1) (emphasis added).

mission assisted by the Office of Planning in a reviewing program to be developed after enactment of the Comprehensive Plan by the D.C. Council. *See also* note 17, *infra*. In short, the Comprehensive Plan is not self-executing, and contrary to TACPEC's contention, this statutory language plainly does not evince any legislative intent to impose a moratorium on development in the District.

The legislative histories of the Comprehensive Plan Act and the Land Use Act are replete with statements that confirm the D.C. Council's intent in this regard. In the introduction to the Council committee report recommending adoption of the Comprehensive Plan Act, the report states that "The [Comprehensive] Plan is a framework for growth and change in the District of Columbia over the next 20 years." REPORT OF THE COMMITTEE OF THE WHOLE ON BILL 5-282, DISTRICT OF COLUMBIA COMPREHENSIVE PLAN ACT OF 1984 (Jan. 17, 1984) (COMPREHENSIVE PLAN ACT COMMITTEE REPORT). As to the impact on existing law, the report states:

> Comprehensive plans have guided the growth of American cities for over 50 years. Whether it is called a comprehensive plan, general plan, master plan, or city development plan, the purpose is usually the same: to provide *a statement of policy to guide future public decisionmaking.* Although many comprehensive plans address social policy issues, the primary emphasis is on physical development over an extended time, usually 10 to 20 years.
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> * * * *
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> Although the Plan serves as an important policy guide, its legal mandate is more limited. *Except as provided by other law or the Plan itself, the District elements are advisory. Thus the District elements are binding on zoning as provided in the zoning enabling act,* urban renewal as provided in the Redevelopment Act and public facilities planning as

> provided in the Plan. In other respects, however, the District elements guide but do not control government decisions.

Id. at 51 (emphasis added). The report specifically addresses the Plan's impact on zoning:

> When the proposed District elements take effect, the Zoning Commission will be required to amend the Zoning Regulations to eliminate any inconsistency with the District elements. . . . After the District elements are adopted, *the Office of Planning, citizens and property owners will initiate zoning cases,* which will propose amendments to the Zoning Regulations.[14]

Id. at 52 (emphasis added).

The Comprehensive Plan Act Committee Report includes several documents which the Council intended as valid interpretative guides for judicial construction of the Act. *Id.* at 57. Pauline Schneider, Director of the Intergovernmental Relations Office of the District government, wrote to D.C. Council Chairman David Clarke:

> The Director, Office of Planning has requested that I . . . respond[] to . . . questions concern[ing] the zoning and urban renewal changes which may be necessary once the [Comprehensive] Plan is enacted and the process for making such changes. The Office of the Corporation Counsel has advised us that *the current zoning process will not be affected by the enactment of the Plan given the fact that the Home Rule Act specifically gives the Zoning Commission sole authority to adopt and amend the zoning regu-*

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[14] As one illustration of how the process will work, the report noted that a full year passed before the Zoning Commission adopted orders establishing a special diplomatic zoning district required by the passage by the NCPC of the Foreign Missions and International Agencies Element. *Id.*

> *lations.* . . . The Planning Office . . . will prepare a zoning revision program . . . based on the Comprehensive Plan for the guidance of the [Zoning Commission] to make any necessary changes.

Letter from Pauline Schneider to David Clarke (Dec. 23, 1983) (emphasis added). Another document prepared by the Office of Planning in November 1983, and appended to the committee report, describes various projected zoning actions necessary to implement the Comprehensive Plan including amendments to zoning regulations and maps.

The legislative history of the Land Use Act similarly reflects the intent of the D.C. Council that the process of conforming existing zoning regulations and maps to the Comprehensive Plan would occur sometime after the Plan became effective and that no moratorium on real estate development in the District be imposed by the Plan itself. With respect to the Land Use Act's impact on existing law,[15] the committee report states:

> Like other District elements, the Land Use Element establishes *policies to guide future public decisions.* The District elements do not impose specific implementation techniques. This task is the responsibility of the various agencies charged with regulatory authority. Instead the District elements establish policies, which guide but do not direct.

REPORT OF THE COMMITTEE OF THE WHOLE ON BILL 5-507, DISTRICT OF COLUMBIA COMPREHENSIVE PLAN ACT OF 1984 LAND USE ELEMENT AMENDMENT ACT OF 1984, at 4 (1984) (LAND USE ACT COMMITTEE REPORT) (emphasis added). A distinguishing feature of the Land Use

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[15] The Land Use Act Committee Report lists as one of the map changes for Ward 3 the designation of the northwest corner of Wisconsin Avenue, N.W., and Van Ness Street, N.W., as low density commercial. LAND USE ACT COMMITTEE REPORT at 19.

Act is in the inclusion of four generalized land use maps to complement the text of the Act. In this regard, the Land Use Act Committee Report states:

> The maps depict land use policies in a generalized manner. They do not identify specific parcels or properties. This "soft-edged" character is intended to provide policy guidance while affording needed flexibility. Although the language adopting the maps includes specific references to streets, blocks, and intersections, the maps are intended to remain generalized. The proposed legislation includes these specific descriptions because they are the only way the legislative body can give sufficient direction to the cartographers who must prepare the maps.

Id. The Committee report also specifically states that the generalized land use maps indicate objectives only and are not to be confused with the District zoning maps which are adopted by the Zoning Commission as part of the zoning regulations. *Id.* at 5.[16]

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[16] The committee report makes clear that the policies of the Land Use Element recognize that changes in the zoning regulations are needed and that to accomplish them the Office of Planning is to prepare a zoning modification program. In a letter of October 31, 1984, that was attached to the committee report, the response by the Office of Planning referred to the preliminary list of recommended zoning changes needed to implement the Comprehensive Plan that the Office had prepared and provided to the Council in November 1983, and advised:

> Our implementation program will be initiated following the enactment of the Land Use Element of the Comprehensive Plan. The program includes not only preparing recommendations to the Zoning Commission regarding text and map changes but also a number of administrative and statutory changes to existing Executive Orders, permitting processes and laws.

The November 1983 list of zoning changes is the same document that also appears as an attachment to the Comprehensive Plan Act detailing projected zoning actions necessary to implement the Comprehensive Plan.

Also indicative of the D.C. Council's intent with respect to the imposition of a building moratorium is the Council's progress report to the Mayor on implementing the District elements of the Comprehensive Plan.[17] REPORT OF THE COMMITTEE OF THE WHOLE ON PR 6-320, PROGRESS REPORT ON THE COMPREHENSIVE PLAN FINDINGS RESOLUTION OF 1986 (1986) (PROGRESS REPORT). The progress report noted that the Mayor generally had not made satisfactory progress in implementing the District elements of the Comprehensive Plan and specifically observed the failure to make the zoning changes called for by the Plan that were necessary to protect residential neighborhoods from incompatible commercial development along Wisconsin Avenue. The report also noted the Mayor's failure to establish priorities and a timetable for implementing the Plan.[18]

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[17] Section 101(6) of the Comprehensive Plan Act provides:

> Continuous community input into the implementation of the Plan will be assured by the requirement of a periodic review. The *Mayor* of the District of Columbia *shall* submit to the Council of the District of Columbia every 2 years, a *report on the progress being made* by the District government *in implementing the Plan.* The Council of the District of Columbia will schedule public hearings on the matter and following each review period, will submit, to the Mayor of the District of Columbia, its findings and copies of the public testimony.

(Emphasis added).

[18] Dissatisfaction with the response of the executive branch in implementing the Comprehensive Plan previously had been registered by Council Chairman Clarke in a letter to the Zoning Commission and the Office of Planning. Letter from David Clarke to Zoning Commission and Office of Planning (March 17, 1985). Chairman Clarke expressed concern that these agencies had failed to "sponsor any cases within the past year for the purpose of amending Zoning Regulations that are inconsistent with the Land Use Element of the Comprehensive Plan." *Id.* After noting the Zoning Commission's responsibility to implement those aspects of the Plan that are inconsistent with existing zoning, the Chairman specifically referred

To summarize, the language and the legislative histories of the Comprehensive Plan Act and the Land Use Act clearly reflect the intent of the D.C. Council that the

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to the western side of Wisconsin Avenue between Van Ness and Rodman Streets as an area requiring attention.

> The C-3-A zoning district along this corridor may be inconsistent with the Plan's designation of it for moderate density commercial land use with a local neighborhood center. The Zoning Regulations state that the C-3 district "is designed to accommodate important sub-centers supplementary to the Central Business district" and that the C-3-A district "shall permit medium density development." This language is quite similar to the language in the Plan that describes medium density commercial land use and multi-neighborhood or regional centers. The language in the Zoning Regulations that is used to describe C-2-A and C-2-B districts more closely resembles the language in the Plan that describes the designations of local neighborhood center and moderate density commercial land use.

Id. The Chairman urged the Zoning Commission to institute immediately the process of implementing the Comprehensive Plan with particular focus upon the areas of inconsistency to which the Commission already had been alerted. The implementation process should not be further delayed, the Chairman observed, because

> in the absence of changes in zoning, critical land use decisions will continue to be made in many areas throughout the District in a manner that not only is contrary to the policy objectives of the Comprehensive Plan but also may jeopardize the achievement of those objectives during the life of the Plan. *In the case of the western side of Wisconsin Avenue between Van Ness and Rodman Streets, it already is too late to affect a controversial "matter-of-right" development that is underway at 4000 Wisconsin Avenue,* but there are other adjacent parcels where new zoning could provide protection that is consistent with the Comprehensive Plan.

Id. (emphasis added). The Chairman sent another copy of this letter to the Zoning Commission as an attachment to a later letter to the Commission advising of the Council's unanimous approval of the Progress Report's general findings of "insufficient progress . . . in the examination and initiation of cases where present zoning is inconsistent with the Land Use Element of the Comprehensive Plan." Letter from David Clarke to Zoning Commission (July 8, 1986).

process of conforming existing zoning regulations and maps to the Comprehensive Plan would occur after the Plan became effective and that matter-of-right real estate development in the District would continue while this process was underway. The Home Rule Act vests the Zoning Commission with exclusive authority to amend the zoning regulations of the District of Columbia. Home Rule Act § 492(a); D.C. Code § 5-412(e). By leaving D.C. Code § 5-415 untouched, the Home Rule Act did not repeal existing zoning regulations or maps, but rather provided for the creation of a Comprehensive Plan and a mechanism for its future implementation. The D.C. Council understood that the process of reviewing existing zoning regulations for consistency with the Comprehensive Plan would be a time-consuming, deliberative process, and although the Council may have anticipated that the conforming process would commence more quickly than it did, there is nothing in the statutes or legislative histories to suggest that enactment of the Comprehensive Plan would itself halt all matter-of-right development until that process was completed.

C.

That the Comprehensive Plan was not self-executing and did not automatically impose a moratorium on matter-of-right private development did not leave TACPEC without a remedy once the Comprehensive Plan was enacted. TACPEC need not have awaited action by the Office of Planning and the Zoning Commission to raise the issue of inconsistency it now presses before this court. Under the District's Administrative Procedure Act, "[a]ny interested person may petition . . . an independent agency, requesting the promulgation, amendment, or repeal of any rule." D.C. Code § 1-1506(b). TACPEC, as an interested party, could have initiated a petition before the Zoning Commission as early as March 16, 1985, the date the Land Use element of the Comprehensive Plan became effective, and requested emergency ac-

tion to consider whether the existing zoning regulations were inconsistent with the Comprehensive Plan. The D.C. Council expected interested parties or individuals to initiate cases before the Zoning Commission where inconsistency between current zoning regulations and the Comprehensive Plan allegedly exists. COMPREHENSIVE PLAN ACT COMMITTEE REPORT at 52 ("the Office of Planning, citizens and property owners will initiate zoning cases, which will propose amendments to the Zoning Regulations"): *see also* note 18, *supra*. The Zoning Commission is authorized to issue emergency orders, and has done so, on several highly publicized occasions, to prevent matter-of-right development permitted under preexisting zoning regulations. D.C. Code § 1-1506(c); *see Citizens Ass'n v. Washington*, 291 A.2d 699, 702 n. 3 (D.C. 1972) (*Georgetown I*); *Georgetown II*, *supra*, 155 U.S. App.D.C. at 236 & n. 9, 477 F.2d at 405 & n. 9; *Salyer v. McLaughlin*, 100 U.S. App.D.C 29, 31, 240 F.2d 891, 893 (1957); *Ruppert v. Washington*, 366 F.Supp. 686 (D.D.C.1973). Had a timely petition [19] been filed with the Zoning Commission, judicial relief would have been available [20] to review the Commission's determination of consistency.[21] However, the Zoning Commis-

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[19] We do not reach any issue concerning the precise moment a property owner's right to pursue matter-of-right development vests. *See* 11 DCMR § 3202.6 (1987).

[20] Judicial review of rulemaking proceedings before the Zoning Commission is initially in the Superior Court, while initial judicial review of contested case proceedings is in this court. D.C. Code § 1-1510; *Georgetown III*, *supra*, 392 A.2d at 1029 n.3; *see Capitol Hill Restoration Soc'y v. Zoning Comm'n*, 380 A.2d 174, 184 (D.C. 1977), *overruled in part on other grounds*, *Georgetown III*, *supra*, 392 A.2d 1027. Judicial relief may also be available to compel agency action in the event of unwarranted or unreasonable delay. *See Georgetown I*, *supra*, 291 A.2d at 705 n. 15.

[21] TACPEC cites a number of cases to support its assertion that the District of Columbia is a "consistency" jurisdiction, *i.e.*, that zoning maps and regulations must be consistent with the Comprehensive Plan. *See, e.g., Neighborhood Action Group v. Calaveras*

sion is the only forum[22] capable of granting the zoning change TACPEC seeks,[23] and therefore TACPEC's failure to pursue any action before the Commission amounts to a failure to exhaust administrative remedies.

Accordingly, we hold that the Zoning Commission is the exclusive agency vested with responsibility for assuring that the zoning regulations are not inconsistent with the Comprehensive Plan, and that TACPEC failed to exhaust its administrative remedies.

County, 156 Cal. App.3d 1176, 203 Cal.Rptr. 401 (1984); *Philippi v. City of Sublimity*, 294 Ore. 730, 662 P.2d 325 (1983); *see generally* 1 A. RATHKOPF & D. RATHKOPF, THE LAW OF ZONING AND PLANNING § 12.04(2), at 12-15 (1987). Case law from other jurisdiction, however, is unhelpful in this area of the law because "[t]he extent to which zoning decisions must conform to independent comprehensive plans varies from state to state depending upon the phraseology of the consistency legislation and the nature of the mandatory plan." 5 P. ROHAN, ZONING AND LAND USE CONTROLS § 37.03[2], at 37-50 (1988) (footnotes omitted). The cases cited by TACPEC are readily distinguishable.

[22] The BZA and the Zoning Administrator have no power to implement the Comprehensive Plan. The BZA's enabling statute explicitly states that it "shall not have the power to amend any [zoning] regulation or map." D.C. Code § 5-424(e) (1981); *see Rose Lees Hardy Home & School v. District of Columbia Bd. of Zoning Adjustment*, 343 A.2d 564, 566 (D.C.1975); *Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 539 (D.C.1972). The Zoning Administrator is limited to enforcing and certifying occupancy regulations. 11 DCMR § 3200 (1987); Reorg. Order No. 55, Pt. III F, 1 D.C. Code § 185 (1973).

[23] The parties have represented to us that on May 21, 1987, the Zoning Commission voted to rezone the area at issue from C-3-A to C-2-B, the conformance Chairman Clarke advocated, *see* note 18, *supra*, and the kind of lower density zoning that TACPEC argued was mandated by the Comprehensive Plan. To our knowledge, the Zoning Commission has yet to issue an order to that effect. *See* 11 DCMR § 3028.8 ("A written order setting forth a final action shall become final and effective upon publication in the *D.C. Register*, unless a later effective date is provided for by the Commission.").

III

TACPEC also contends that the trial court and the BZA [24] erred in ruling that the list of building applications sent to ANC 3-C by the DCRA was sufficient notice as a matter of law under D.C. Code § 1-261(c).[25] Section 1-261(c)(3) requires that "each affected Advisory Neighborhood Commission is provided regularly by mail with a current list of applications for construction and demolition permits within the boundaries of that Advisory Neighborhood Commission." On December 18, 1985, ANC 3-C received a list of building permits applied for and issued by the DCRA's Permit and Certificate Issu-

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[24] The BZA ruled that it did not have jurisdiction to consider the notice issue, but nevertheless heard evidence and rendered its decision on the issue. The District of Columbia urges that the BZA has ancillary jurisdiction to consider certain limited threshold procedural issues, such as notice, that arise in the context of substantive zoning disputes before the BZA. It cites *Brown v. District of Columbia Bd. of Zoning Adjustment*, 413 A.2d 1276, 1280-81 (D.C. 1980), *appeal after remand*, 486 A.2d 37 (1984), in which the court held that the BZA had inherent authority, and the duty to protect the integrity of its proceedings, to entertain a motion to disqualify an attorney alleged to have violated the revolving door, conflict of interest rule (MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101(B) (1979)). 413 A.2d at 1284. In view of our decision in *Kopff v. District of Columbia Alcoholic Beverage Control Bd.*, 381 A.2d 1372 (D.C.1977), construing the Home Rule Act and the act setting forth the duties and responsibilities of the ANCs (D.C. Law 1-58) to require agencies to give "great weight" to the ANC's written comments and to discuss the issues raised therein in the agency's decision on the merits, *id.* at 1384, the District's position is not without some appeal. However, we need not decide whether the BZA has jurisdiction to decide the notice issue. Assuming that the BZA did have such jurisdiction, its finding that ANC-3 received the statutory notice to which it was entitled was also the finding of the trial court.

[25] Although the BZA's decision on the notice issue used the term "actual notice," the BZA's findings of facts numbers 11 through 15 make clear that the BZA more precisely determined only that the list of applications sent by the DCRA to ANC 3-C complied with the statutory requirements of D.C. Code § 1-262(c)(3).

ance Branch during the week of December 2-6, 1985. Issued building permits are listed first and are designated with the letter "B" and a number. Pending building permit applications follow and are designated with the letter "A" and a number. The list of "A" permits included a reference to the application for the 4000 Wisconsin Avenue, N.W. project and identified it by the letter "A" and a number, by street address, lot and square numbers, and indicated that the application was for a "new building." The listing also stated the date that the application was received, that plans had been filed, the amount of the fee and the date it was paid, and a projected cost of $22,000,000.

We hold that this list provided ANC 3-C with the statutory notice to which it was entitled under D.C. Code § 1-261(c)(3). *See Kopff, supra* note 24, 381 A.2d at 1380-81. While the list may not have been a "model of clarity," to borrow the BZA's observation, we are satisfied that in view of the clear statutory mandate to provide ANCs with current lists of construction applications, the list sufficiently distinguished applications from issued permits to place ANC 3-C on notice that a permit application for 4000 Wisconsin Avenue was pending. *See American Sec. Bank v. American Motorists Ins. Co.*, 538 A.2d 736, 739-40 (D.C. 1988); *George Washington Univ. v. District of Columbia Bd. of Zoning Adjustment*, 429 A.2d 1342, 1345 (D.C. 1981).[26] The BZA concluded

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[26] In view of our conclusion that ANC 3-C received adequate notice under D.C. Code § 1-261(c)(3), we do not reach the trial court's alternative ruling that ANC 3-C also had actual notice of the pendency of the building permit application. *See Shiflett v. District of Columbia Bd. of Appeals and Review*, 431 A.2d 9, 10 (D.C.1981). In any event, TACPEC's reliance on ANC 3-C Commissioner Philip Mendelson's testimony is misplaced because the trial court specifically discredited his testimony. *Washington v. District of Columbia*, 429 A.2d 1362, 1369-70 (D.C.1981) (credibility determination is within the province of the trier of fact). *See American Sec. Bank, supra*, 538 A.2d at 739-40; *George Washington Univ., supra*, 429 A.2d at 1345.

that the list was "more than adequate for any person with an interest in proposed construction to become informed about the significance of [the] distinction [between the "A" and "B" permits], and thereby to know when an application is pending." We think this conclusion even more compelling for elected representative ANC commissioners.

Accordingly, we affirm both the judgment of the trial court and the decision of the BZA.[27]

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[27] TACPEC's final contention, that the District's failure to provide adequate notice of the pending building permit application denied ANC 3-C due process, is meritless. Assuming *arguendo* that the District provided no notice at all, this failure would establish only a statutory violation of D.C. Code § 1-261. ANCs are political subdivisions of the District of Columbia government and therefore do not receive due process protections under the Constitution against actions of the District of Columbia. *Williams v. Baltimore*, 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 L.Ed. 1015 (1933); *Bowen v. State Comm'n of Corrections*, 104 A.D.2d 238, 239-40, 484 N.Y.S.2d 210, 212 (N.Y. App.Div.1984).

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 86-813

TENLEY & CLEVELAND PARK
EMERGENCY COMMITTEE, *et al.*,
Appellants,

v.

DISTRICT OF COLUMBIA, *et al.*,
Appellees.

and

No. 87-468

TENLEY & CLEVELAND PARK
EMERGENCY COMMITTEE, *et al.*,
Petitioner,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT,
Respondent,

and

WISCONSIN AVENUE ASSOCIATION, *et al.*,
Intervenor.

ORDER

On consideration of the motion of appellants and petitioners to consolidate the above appeals, and there appearing to be no opposition thereto, it is

ORDERED that the motion is granted and these appeals are hereby consolidated for all purposes. It ap-

pearing the record on appeal has been filed in No. 86-813, it is

FURTHER ORDERED that respondent is directed to file the record on appeal in No. 87-468. It is

FURTHER ORDERED that the consolidated briefs of appellants and petitioners shall be filed within 40 days after transcript in No. 86-813 is filed in this court.

BY THE COURT:

/s/ William C. Pryor
WILLIAM C. PRYOR
Chief Judge

APPENDIX C

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Civil Action No. 2251-86

TENLEY & CLEVELAND PARK
EMERGENCY COMMITTEE, *et al.*,
Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,
Defendants.

Mr. Richard B. Nettler for the plaintiffs.

Assistant Corporation Counsel O. Gregory Lewis for the defendants District of Columbia, District of Columbia Department of Consumer and Regulatory Affairs, John Touchstone and Carol B. Thompson.

Messrs. Whayne S. Quin and C. Francis Murphy for the defendants Donohoe Construction Company, Holladay Corporation and 4000 Wisconsin Avenue Associates.

MEMORANDUM OPINION AND ORDER DENYING DEFENDANT'S MOTION TO AMEND THE JUDGMENT OR FOR A NEW TRIAL

SALZMAN, *Associate Judge*: This matter came before the Court on an application to enjoin construction of an office and theater complex at 4000 Wisconsin Avenue, N.W. Plaintiff Tenley and Cleveland Park Emergency Committee is an *ad hoc* group of individuals who live near the proposed complex. The individual plaintiff is Advisory

Neighborhood Commissioner Phil Mendelson, who also resides in the area and whose district encompasses the construction site.[1] Defendants Donohoe Construction Company and Holladay Corporation are general partners in defendant 4000 Wisconsin Avenue Associates, developer of the complex. The other defendants are the District of Columbia Government and District officials who issued or approved the permit allowing construction to begin.

Plaintiffs contend that (1) even if the complex may conform to current District zoning regulations,[2] it violates the District's Comprehensive Plan[3] for development of the site which assertedly supersedes those regulations; (2) the building permit was improperly issued without giving 30 days advance notice for comments to the Advisory Neighborhood Commission ("ANC") required under 1 D.C. Code § 261(c); (3) the Mayor has

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[1] The Court passes the question whether the plaintiff Emergency Committee, an unincorporated association, may maintain this action. *See, Dupont Circle Citizens Association* v. *Barry*, 455 A.2d 417, 421 (D.C. 1983); *Goto* v. *District of Columbia BZA*, 423 A.2d 917, 921 n.8 (1980). Plaintiff Mendelson has standing to bring the suit in his individual capacity as an area resident and as the Advisory Neighborhood Commissioner for the affected area. *Goto, supra; Shiflett* v. *District of Columbia Board of Appeals*, 431 A.2d 9 (D.C. 1981); 5 D.C. Code § 426 (1981).

[2] The D.C. Zoning Regulations are codified at 11 DCMR §§ 100 *et seq.* (1985). The complex site is zoned "C-3-A." This permits medium density mixed commercial development. 11 DCMR § 740.

[3] The Comprehensive Plan for the National Capital is in several parts. Some were prepared by federal and some by District of Columbia officials. The elements pertinent to this case include "The District of Columbia Comprehensive Plan Act of 1984" (D.C. Law 5-76, compiled at 10 DCMR Ch. 1-10 (1984)), and "The District of Columbia Comprehensive Plan Act of 1984 Land Use Element Amendment Act of 1984," (D.C. Law 5-187, reprinted at 32 DCR 873, February 15, 1985) (Plaintiffs' Exhibit 34). At the 4000 Wisconsin Avenue complex, the Land Use Element of the plan calls for "moderate density commercial land use." D.C. Law 5-187, Sec. 1136 (b)(56).

suspended the developers' right to construct new streets needed for the complex thereby invalidating the building permit; and (4) automobile traffic generated by the complex will overload a nearby intersection and will create a public nuisance at morning and evening rush hours.

The case came on for hearing on April 22, 1986. At that time the Court granted defendants' unopposed motion under Civil Rule 65(a)(2) to consolidate the preliminary injunction hearing with the trial on the merits. Plaintiffs thereupon withdrew their request for preliminary relief and the case went forward on the merits only. At the close of plaintiffs' case the Court granted defendants' motion for judgment. With respect to the three counts challenging the issuance and validity of the building permit, the Court ruled that plaintiffs' failure to exhaust their administrative remedies barred their suit. As an alternative ruling, the Court found that ANC 3-C did receive the advance notice required by 1 D.C. Code § 261(c) but did not register objections within the time allotted by section 261(d). The Court granted judgment for defendants on the remaining public nuisance count on its finding that plaintiffs had not made out a *prima facie* case.

The Court stated its factual findings and legal conclusions orally on the record as permitted by Civil Rule 52(a).[4] In parts I through IV of this memorandum the Court amplifies those findings and conclusions. In Part V, the Court rules on plaintiffs' motion to amend the judgment or for a new trial.

I

4000 Wisconsin Avenue Associates seeks to develop a 4.7 acre site located on the west side of Wisconsin Avenue, N.W., bordering on Upton Street, N.W., and Glover

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[4] Pursuant to Civil Rule 58, the Court also approved the form of judgment entered separately by the Clerk on April 25, 1986.

Archbold Parkway. At this location the latter two streets are dedicated and mapped but not built. The developers wish to construct a multi-million dollar, multi-use, five story office and retail complex. Completed it will encompass 404,500 square feet of office space, 41,000 square feet of retail space, a health club, six movie theaters with 2070 seats, and a parking garage. Current zoning regulations permit construction of a complex this size at the site as a matter of right.[5]

The developers formally applied to the District of Columbia Department of Consumer and Regulatory Affairs (DCRA) for a permit to build the complex on December 4, 1985. Notice of that application was included in the list of building permits issued and applied for which is compiled weekly by DCRA's Permit and Certificate Issuance Branch. DCRA mailed copies of that list to the Advisory Neighborhood Commission by December 9, 1985. The executive director of ANC 3-C received its copy by December 18, 1985.

Section 261(d) of Title 1 allows 30 days for affected ANC's to make recommendations regarding pending building permit applications before the agency may issue those permits. DCRA received no recommendations from ANC 3-C within the comment period. The permit to build 4000 Wisconsin was issued on Feburay 19, 1986. The ANC 3-C commissioners subsequently took formal action opposing its issuance on February 24, 1986.[6] DCRA Director Carol Thompson, however, declined their request to rescind the permit.

Plaintiffs commenced this action on March 19, 1986. That day Judge Greene denied their application for a

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[5] See generally note 2, *supra*, and 11 DCMR §§ 770 *et seq.*

[6] While 4 (of the 9) individual ANC 3-C Commissioners had expressed opposition to the complex in correspondence to various District officials, the formal action required by Section 261(d) was only taken on the date noted.

temporary restraining order. The case was heard on the merits on April 22, 23 and 24, 1986.

II

It is a basic principle of administrative law that when the legislature creates an administrative agency with expertise in a given area, the courts should not be the first to pass on subjects within the agency's ken. Rather, they should refrain until the agency has brought its expertise to bear on the particular problem by making a preliminary investigation of the facts, analyzing them and applying them to the statutory scheme. The courts of this jurisdiction adhere to this principle in zoning matters, *Brawner Building, Inc.* v. *Shehyn*, 143 U.S. App.D.C. 125, 442 F.2d 847 (1971), as well as in other areas of administrative law. *E.g., Rhodes* v. *Quaorm*, 465 A.2d 370, 372 (D.C. 1983); *Pender* v. *District of Columbia*, 430 A.2d 513, 515 (D.C. 1981).

In the case now before the Court, plaintiffs seek to invalidate a building permit issued by DCRA. The issuance of that permit, however, is subject to review and reexamination by an administraitve agency: the Board of Zoning Adjustment (BZA). 5 D.C. Code § 424(f). The decision of the BZA in turn may be reviewed by the District of Columbia Zoning Commission 5 D.C. Code § 424(i), 11 DCMR § 3103 (1985). Plaintiffs argue that even if the proposed complex at 4000 Wisconsin Avenue complies with the zoning regulations now governing that site, the regulations themselves are invalid for want of conformity with the Comprehensive Plan, that the latter controls,[7] and that the BZA has no authority to amend the zoning regulations.[8] Even accepting that point plain-

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[7] See footnote 3, supra.

[8] 5 D.C. Code § 424(e); *Citizens Ass'n of Georgetown, Inc.* v. *District of Columbia Board of Zoning Adjustment*, 337 A.2d 485 (1975).

tiffs' suit may not go forward. Assuming without deciding that a discrepancy exists between the regulations and the plan, the Zoning Commission can harmonize them; it has undoubted authority to amend the existing regulations if need be. 5 D.C. Code §§ 412(e) and 415. The plaintiffs have standing to bring the matter directly to the Zoning Commission's attention. 11 DCMR § 3010.1; *Schneider* v. *District of Columbia Zoning Commission*, 383 A.2d 324, 329 (D.C. 1978). The Commission in turn has a statutory obligation to insure that the zoning regulations are "not inconsistent" with the Comprehensive Plan. 5 D.C. Code § 414; *see, Capitol Hill Restoration Society* v. *Zoning Commission*, 380 A.2d 174, 183-84 (D.C.) 1977.[9] Assuming the gulf between the regulations and the plan is as wide as plaintiffs picture it—a matter not self-evident [10]—the Court may not presume that the Commission (or any administrative agency) will fail to do its duty.[11]

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[9] While it is not necessary to reach the issue, the Court notes that the Comprehensive Plan is cast largely in precatory rather than directory terms. For example, the Plan's general provisions state, "the District elements of the Plan are a guide intended to establish broad policies and goals while affording flexibility for future implementations and are not binding policy directives." 10 DCMR § 109.6.

[10] Current zoning regulations permit medium density mixed use commercial development on the site. Given the size of the site and the proposed use, defendants contend that existing zoning regulations allow construction of this complex as a matter of right. *See* 11 DCMR §§ 740, 741, 770-775 (1985). The Comprehensive Plan marks this site for moderate density commercial use, which allows shopping and service areas such as chain grocery and drug stores and branch department stores. D.C. Law 5-187, Sec. 1107(a)(2). Plaintiffs argue that the plan requires that this site be developed as a local neighborhood center, but that existing zoning requirements allow construction of a facility of a much greater scope.

[11] Indeed the Court must presume that an agency will act with administrative regularity and good faith. *FTC* v. *Owens-Corning Fiberglas Corp.*, 200 U.S.App.D.C. 102, 111, 626 F.2d 966, 975 (1980).

The *Brawner* decision, *supra*, is both in point and illustrative of the type of arguments plaintiffs are pressing and the manner in which the Court must deal with them. Plaintiffs in *Brawner* opposed operation of a "halfway house"—a form of correctional institution—in a residential zone that permitted "rooming houses". Without going to the BZA, plaintiffs sued in the United States District Court to enjoin the District officials from issuing certificates needed to operate the halfway house. The district court (which then had jurisdiction over such matters) granted plaintiffs permanent relief. The court prohibited issuance of the permit on the basis of the court's understanding and application of the zoning regulations. The District of Columbia Circuit reversed the trial court. It vacated the injunction, holding that resort must first be had to the BZA and that judicial review must await the agency's interpretation of the zoning regulations—which the district court must accept if reasonable and supported by substantial evidence in the record as a whole. *Brawner, supra*, 143 U.S.App.D.C. at 131, 442 F.2d at 853.

In the case at bar, plaintiffs essentially want the Court to interpret the comprehensive plan and apply it to the zoning regulations without first having obtained the views of the BZA and the Zoning Commission, the administrative agencies directly responsible for carrying those laws into effect. *Brawner* precludes this. The point need not be belabored. Plaintiffs have already taken one aspect of this matter—the question of the street closings—to the BZA. BZA Application No. 14424, Appeal of Tenley and Cleveland Park Emergency Committee and North Cleveland Park Citizens' Association from the Zoning Administrator's decision issuing building permits B-311718; B-312556, B-312557. They must now follow suit with the remainder of their contentions before the Court may entertain them.

Accordingly, either the Zoning Commission, the BZA, or both are available to hear plaintiffs' claims. One

agency or the other is empowered to grant plaintiffs relief (if warranted). The courts may not act on plaintiffs' request for permanent relief until those avenues of administrative relief have been explored. The Court therefore granted defendants' motion to dismiss the counts of the complaint challenging the issuance and validity of the building permit for 4000 Wisconsin Avenue, N.W.

III

Having heard extensive testimony on the question whether ANC 3-C received adequate notice prior to the issuance of the building permit, and in an effort to avoid any need to relitigate this issue, the Court alternatively held that ANC 3-C was given and did receive the advance notice required by 1 D.C. Code § 261(c).

The Advisory Neighborhood Commission Act, 1 D.C. Code §§ 252 *et seq.*, requires the District Government to notify advisory neighborhood commissions of building permit applications within their respective boundaries. 1 D.C. Code § 261(b), (c)(1) and (c)(3).[12] The affected Neighborhood Commission may "within 30 days of the mailing of the notification", consider the application at a public meeting and file written recommendations with the Mayor, the Council and the District agency concerned. 1 D.C. Code § 261(d). "At the close of business of the 31st day from mailing of such written notice * * * the affected District government entity shall proceed the (*sic*) make its decision." *Ibid.*

On December 18, 1985, ANC 3-C received in the mail a list of the building permit applications that had been

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[12] Were this question *res nova*, there might be some merit to the developers' argument that building permit applications were intended to be covered by § 261(c)(3) only, which mentions them specifically. The Court of Appeals, however, has ruled otherwise. *Shiflett, supra*, 431 A.2d at 10 (decided under 1 D.C. Code § 171a (1978 Supp.).

filed with DCRA's "Permit and Certificate Issuance Branch" that week of December 2-6, 1985. (Plaintiffs' Exhibit 9.) The application for 4000 Wisconsin Avenue, N.W., appears on page seven of this document. The listing identifies the application by permit number, street address, lot number, square number and type. 4000 Wisconsin Avenue, N.W. was designated as a "new building". The listing reveals the date the application was received, contains a notation for plans, specifies the fee, the date paid and provides for remarks. In the case of 4000 Wisconsin Avenue, N.W., the sole remark was "$22,000,000", the projected cost of constructing the complex.

ANC Commissioner Phil Mendelson acknowledged that ANC 3-C received this document on December 18, 1985. (The document bears that date stamped on it by an official of ANC 3-C.) In accordance with regular practice, ANC 3-C Executive Director Peggy Robin reviewed it and highlighted the applications for sites within the boundaries of ANC 3-C by circling them in red. Ms. Robin then distributed the relevant pages of the record to each of the single member district commissioners.

Commissioner Mendelson acknowledged that Ms. Robin supplied him with the page that included the notice for 4000 Wisconsin Avenue, N.W., circled in red. He testified, however, that he did not know what it meant. He explained that ANC 3-C filed no recommendations within the thirty day comment period because he and the other commissioners had made a mistake. They all assumed this document meant that a permit to build 4000 Wisconsin Avenue had already been issued, not that an application for one was pending.

The Court finds Commissioner Mendelson's testimony on this point self-serving and not credible. He testified that he was initially elected an ANC 3-C commissioner in 1979 and reelected regularly since then. He is a member of several community organizations. Among them

are the Committee of 100 on the Federal City, the Wisconsin Avenue Corridor Committee and the McLean Gardens Condominium Communications Committee. These organizations are actively concerned with the welfare of the District and well known for their interest in and knowledge about major developments proposed for construction in their areas of concern.[13] Those areas include the site in question. Commissioner Mendelson further testified that ANC 3-C has received listings similar to the one in this case weekly from the DCRA at least since 1982. He also stated that he was aware that the Advisory Neighborhood Commission Act required the District Government to notify ANC's of pending building permit applications.

Despite this background, the Commissioner asked the Court to accept that for four years he and other ANC 3-C commissioners had been receiving these lists of building permit applications weekly, but that neither he nor they ever inquired about their meaning or purpose despite their recognition that the listings concerned important matters about which the ANC's were entitled by law to be heard.

Moreover, Commissioner Mendelson conceded that he received this particular notice on approximately December 18, 1985. He believed it was important, for he was well aware that some plan for developing 4000 Wisconsin Avenue was in the offing. Commissioner Mendelson lives in McLean Gardens but a short walk from the complex. He had been discussing the defendants' plans for the site with their officers for months. Nevertheless, he put the notice aside because of personal commitments without so much as an inquiry of any DCRA official about it.[14]

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[13] See, *e.g.*, *Capitol Hill Restoration Society v. Zoning Commission, supra,* (Committee of 100 among the intervenors).

[14] The plaintiffs made much of the fact that now DCRA is prefacing these lists with an express invitation for comments from

The Court finds Commissioner Mendelson's recollections in this regard clouded by his current desire to bar construction of the planned complex. Plaintiffs cannot complain now that their concerns about the complex were ignored when, having been alerted to its pendency, they failed to voice them in timely fashion.

In sum, as an alternative to its prior ruling concerning exhaustion, the Court finds that (1) the notice DCRA mailed on December 9 and ANC 3-C received on December 18, 1985 fulfilled the District's duty to inform the ANC of pending action under 1 D.C. Code § 261(c); (2) ANC 3-C had actual timely notice of the building permit application and failed to make recommendations on the proposed action within the time and in the manner called for by 1 D.C. Code 261(d). Therefore, on the merits, the Court found plaintiffs' lack of notice claim not supported by the evidence.

IV

Plaintiffs also contend that the vehicular traffic to and from the proposed 4000 Wisconsin Avenue complex weekday mornings and evenings will create a public nuisance. No evidence was offered to show that the planned complex did not meet the zoning restrictions for the site.[15] Rather, plaintiffs relied on the testimony of Dr. Everett C. Carter to buttress their claim. The Court

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the ANC's. The law does not mandate the form this notice must take and actual notice suffices in any event. *Kopff* v. *District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1382 (1978). Be that as it may, Commissioner Mendelson admitted on the stand that a telephone call to a responsible DCRA official would have sufficed to answer any question about the lists' significance. Any reasonably responsible person would have made such an inquiry in the years the lists were being received.

[15] This precludes any argument that the complex is a public nuisance as a matter of law. *See, Thomas Circle Ltd Partnership* v. *United States*, 372 A.2d 555 (D.C. 1977); *Raleigh* v. *United States*, 351 A.2d 510 (D.C. 1976).

accepted Dr. Carter as an expert in traffic engineering and transportation planning. The witness analyzed current traffic patterns at the intersection of Wisconson Avenue and Van Ness Street, N.W. He then estimated the additional automobile traffic that the planned complex could be expected to generate. He concluded that the cumulative effect of the new traffic would engender delays at that intersection by causing traffic on Wisconsin Avenue to back up several blocks in each direction during weekday rush hours. In highway engineering parlance, Dr. Carter predicted that the intersection would "fail" at those times. During cross-examination Dr. Carter acknowledged that some of his traffic projection figures were inaccurate. After correcting them his conclusions remained the same. He also noted that other intersections in the District of Columbia fail each rush hour.

A public nuisance is an unreasonable interference with a right common to the general public. *B&W Management, Inc.* v. *TASEA Investment Co.*, 451 A.2d 879, 881 (D.C. 1982) (citing Restatement (Second) of Torts § 821B(1) (1979)). The right to seek to enjoin a public nuisance normally lies with governmental authorities. However, "a private party may sustain an action to enjoin or recover damages for a public nuisance if that party can allege and prove special damage, distinct from that common to the public." *Id.*, 451 A.2d at 882.

Plaintiffs' only witness aside from Dr. Carter was Commissioner Mendelson.[16] He lives in the McLean Gardens development. Commissioner Mendelson testified at length on other subjects. But he offered no testimony about how

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[16] Plaintiffs did attempt to call another witness, Joel Odum, who lives at 3941 Van Ness Street, N.W. However, following counsel's proffer that Mr. Odum would testify solely as to when he became aware that construction was to commence at the site, the Court ruled his testimony irrelevant to the proceeding. No proffer was made that Mr. Odum would somehow be "specially damaged."

he might be specially damaged by construction of this complex or affected by it in any way not shared by the public at large. Neither did he attempt to explain how the complex might personally affect any of the individual members of the Tenley and Cleveland Park Emergency Committee in some special way.

Thus, on the public nuisance issue, the Court was given only Dr. Carter's testimony that the rush-hour traffic spawned by the complex will overburden one intersection and that neighborhood traffic might increase as a result. Accepting Dr. Carter's testimony as correct, standing alone it does not demonstrate that Commissioner Mendelson or the residents who comprise plaintiff Emergency Committee would be "specially damaged"—that is, would incur some harm distinct from being stuck in rush-hour traffic with others of the motoring public. Without that showing plaintiffs, private individuals, cannot prevail in an action to enjoin a public nuisance. *B&W Management, Inc., supra. See also, President and Dir. of Georgetown College* v. *Diavatis,* 470 A.2d 1248, 1250-51 (D.C. 1983).

In sum, having weighed the evidence presented,[17] the Court finds that plaintiffs have not carried their burden of proof. Accordingly, this count of their complaint was dismissed.[18]

V

On May 5, 1986 plaintiffs moved to amend the judgment or for a new trial. They challenge the dismissal of three counts of the complaint for failure to exhaust

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[17] As this was a non-jury case, the Court weighed the evidence on the motion to dismiss as it would have at the end of the entire case. Civil Rule 41(b); *Marshall* v. *District of Columbia,* 391 A.2d 1374, 1379 (D.C. 1978).

[18] In granting defendants' motion to dismiss, the Court took no position on the merits of the proposed complex or on the plaintiffs' reasons for opposing its construction and none should be inferred.

administrative remedies; alternatively they contend that the case should have been stayed, not dismissed. Neither contention is meritorious and the motion must be denied.

Plaintiffs argue that the Court should not have dismissed their claim for failure to exhaust administrative remedies because (1) defendants' (*sic*) did not affirmatively plead exhaustion, (2) dismissal was not required as a matter of law, and (3) resort to the BZA would be futile.

As described above (pp. 2), this case initially came before the Court on plaintiffs' application for a preliminary injunction. At this juncture plaintiffs first acquiesced in defendants motion to consolidate that hearing with the trial on the merits and second withdrew their request for preliminary relief; the trial commenced that day. Plaintiffs' action obviated the need for a further exchange of pleadings. Defendant developers had only responded to the application for preliminary relief but had not yet answered the complaint; the District defendants filed their answer after the trial commenced. Defendants then argued exhaustion during their motion to dismiss at the end of plaintiff's case. Given the posture of the case, the Court finds plaintiffs were fairly alerted to the exhaustion question in defendants' papers and the question was ripe for resolution.

Plaintiffs argue in essence that defendants' pleadings were technically defective. Such defects do not forfeit substantive defenses in the absence of a showing of prejudice. *Jackson* v. *District of Columbia*, 412 A.2d 948, 951-52 (1980). Even were the Court to credit plaintiffs' argument that exhaustion should somehow have been raised earlier, they have not demonstrated that the claim was inappropriately considered. Plaintiffs rely on *Barnett* v. *District of Columbia Department of Employment Services*, 491 A.2d 1156 (D.C. 1985), to argue that exhaustion is waived if not plead. They misapprehend that the (*sic*) decision. As Judge Mack's opinion for the Court

of Appeals in *Barnett* explained at length, relaxation of the exhaustion rule is proper "[*i*]*n the exceptional case* where a 'fair opportunity' to pursue that route has been denied." *Id.* at 1162 (emphasis supplied).[19] Such circumstances may include cases where resort to the agency would be futile or where the failure to exhaust was caused by circumstances beyond the litigants' control. *Id.* at 1162-63.

Plaintiffs have not shown the existence of any such circumstances. Indeed, they not only concede that the BZA has authority to address some of their concerns they are currently litigating before that agency. (See p.7, *supra.*) Neither do plaintiffs dispute that the zoning Commission provides another avenue of administrative relief they have yet to explore. Plaintiffs have not persuaded the Court that resort to these agencies would be futile. Nor have plaintiffs attempted to show that their failure to exhaust their remedies was caused by any factors beyond their control. The Court perceives none. Given the posture of this case and plaintiffs' pending administrative action, their complaints concerning exhaustion are not well taken.

Plaintiffs urge that even if the exhaustion rule applies, the Court should have stayed rather than dismissed their case pending the outcome of administrative proceedings. The authorities they cite do not support this contention. *Brawner Building, Inc.* v. *Shehyn, supra*, and *President and Directors of Georgetown College* v. *Diavatis, supra*, involved requests not only for permanent but for preliminary relief. The latter was available from the trial court only. Thus in *Brawner* and *Diavatis* the question of a preliminary injunction remained before the court even after the question of permanent relief was directed to the agency. Similarly, in *Washington Federal Savings and Loan Ass'n* v. *Whiteside*, 488 A.2d 936 (D.C. 1985),

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[19] The concurring opinion of Judge Terry confirms this reading of *Barnett*. *Id.* at 1164.

plaintiff requested a judgment for possession. Here again the form of relief sought was available only from the trial court. It was therefore proper to stay the proceedings so that following administrative review and appeal the plaintiff could return to court for that relief if need be.

In the case at bar, however, plaintiffs withdrew their request for preliminary relief. (See p. 2, *supra.*) The sole questions before this Court concerned the validity of the building permit and the impact of the Comprehensive Plan on the existing zoning at the site. Those matters are resolvable by the BZA or the Zoning Commission. When those administrative agencies have acted, jurisdiction to review their decision appears to lie with the Court of Appeals rather than this Court.[20] In the circumstances, staying rather than dismissing the proceeding was inappropriate.

Finally, plaintiffs urge that the Court should have entered a declaratory judgment concerning the impact of the comprehensive plan on the zoning regulations and the District's building permit application procedures. Whether to grant such relief is a matter of judicial discretion. See 28 U.S.C. § 2201; Superior Court Civil

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[20] Where judicial review may be sought upon the conclusion of administrative proceedings hinges upon the nature of the administrative action and whether it is defined as "rule-making" or a "contested case." *See, Citizens Association of Georgetown* v. *Zoning Commission of the District of Columbia, supra,* 392 A.2d at 1029 n.3; *DuPont Circle Citizens Ass'n* v. *Zoning Commission,* 426 A.2d 327 (1981); *Capitol Hill Restoration Society* v. *Zoning Commission,* 282 A.2d 101 (D.C. Cir. 1972); and 1 D.C. Code § 1510 (1981). (As noted above (p. 2), plaintiffs withdrew their request for *preliminary* relief at the opening of the trial.) An appellate court as well as a trial court has authority to grant injunctive relief in aid of its own jurisdiction. *See, e.g., FTC* v. *Dean Foods Co.,* 384 U.S. 597 (1966); *Association of National Advertisers, Inc.* v. *FTC,* 201 U.S.App.D.C. 165, 193, 627 F.2d 1151, 1179 (1979) (concurring opinion of Judge Leventhal), *cert. denied,* 447 U.S. 921 (1980).

Rule 57; *Moore* v. *U.S. House of Representatives*, 236 U.S.App.D.C. 115, 123-24, 733 F.2d 946, 954-55 (1984); *Lampkin* v. *Connor*, 123 U.S.App.D.C. 371, 374-76, 360 F.2d 505, 508-510 (1966); and *McIntosh* v. *Washington*, 395 A.2d 744 (D.C. 1978). The same reasons that caused the Court to defer ruling upon the merits of plaintiffs' challenges before the administrative agencies have acted impel the conclusion that a declaratory judgment would be equally inappropriate.

Accordingly, it is this 19th day of May, 1986,

ORDERED, that plaintiffs' motion to amend the judgment or for new trial is *denied.*

/s/ Richard S. Salzman
RICHARD S. SALZMAN
Associate Judge
Signed in Chambers

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APPENDIX D

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
[D.C. LOGO]

Appeal No. 14424, of the Tenley and Cleveland Park Emergency Committee and the North Cleveland Park Citizens Association, pursuant to Sections 8102 and 8206 of the Zoning Regulations (11 DCMR 3200.2 and 3105.1, respectively), from the administrative decision of the Zoning Administrator made on December 20, 1985 and February 19, 1986 in issuing building permits numbered B311718, B312556 and B312557 for construction on the site of a building for office, retail and theatre use in a C-3-A District at premises 4000 Wisconsin Avenue, N.W., (Square 1823, Lot 9).

HEARING DATE: May 28, 1986
DECISION DATE: July 2, 1986

FINDINGS OF FACT:

1. The site is located on the west side of Wisconsin Avenue, N.W., between Upton Street on the north and the present site of the Federal National Mortgage Association (FNMA) on the south. The site is in a C-3-A District, and is known as premises 4000 Wisconsin Avenue, N.W.

2. Appellants, the Tenley and Cleveland Park Emergency Committee and the North Cleveland Park Citizens Association, have appealed the decision of the Zoning Administrator to issue building permits numbered B311718, B312556 and B312577, authorizing construction on the premises 4000 Wisconsin Avenue, N.W.

3. Permit numbered B311718 was issued on December 20, 1985, and authorized Intervenor-Appellee, 4000 Wisconsin Avenue Associates (4000 Associates) to perform excavation and sheeting and shoring.

4. Permit numbered B312556 was issued to 4000 Associates on February 17, 1986, and authorized the construction of: (1) a five-story building for office, retail, and theater use; and (2) a 20-foot high retaining wall.

5. Permit numbered B312557 was issued to 4000 Associates on February 19, 1986, and authorized the construction of stairs projecting into public space.

6. The application for the building permit was filed on December 4, 1985, after having been filed for review in the Zoning Division on June 3, 1985.

7. Appellants assert that the issuance of the permits was erroneous on the following grounds:

(a) As to all permits, that the Zoning Administrator or other responsible officials failed to give ANC 3C the notice required by D.C. Code Sections 1-261(c)(1) and 1-261(c)(3);

(b) As to all permits, that they are inconsistent with the Land Use Element and other elements of the Comprehensive Plan for the National Capital;

(c) As to permit numbered B312556, that on the date when it was issued, the construction permits for streets to serve the project stood suspended, with the result that the development could not effectively provide parking spaces required by the Zoning Regulations; and

(d) Permit numbered B311718 should not have been issued before approval of the entire project.

8. ANC 3C filed a written statement, dated May 21, 1986, of its issues and concerns, identifying them as follows:

(a) "Comprehensive Plan: violation by the development and lack of implementation."

(b) "Inadequate notice of the permit applications."

(c) "Lack of streets and parking ingress/egress."

(d) "Developers's misrepresentations." and

(e) "Adverse impact—air quality and traffic—and violation of the purpose of zoning."

The May 21, 1986 statement of ANC 3C incorporated earlier resolutions dated January 27, 1986, February 24, 1986, and March 11, 1986. No resolution of ANC 3C dated January 27, 1986 has been submitted. The ANC also submitted other documents which it did not incorporate in its statement of issues and concerns. The resolution dated March 11, 1986 addresses traffic issues and the proposed construction of portions of Upton Street and the Glover Archbold Parkway. The resolution dated February 24, 1986 sets forth the following concerns:

(a) The concern, also raised by appellants, about the issuance of the building permit at a time when the street paving permits stood suspended;

(b) Concern about the massive and undesirable impact of the building on the Wisconsin Avenue corridor, including residential neighborhoods; and

(c) That the ANC was "purposefully kept in the dark about this project by the developer. . . ."

9. With the sole exception of the issue of access for required parking, neither appellant nor any other party to this appeal contends that the proposed building would violate the Zoning Regulations as they read on the date that the permit was applied for.

10. The Department of Consumer and Regulatory Affairs has not assigned the Zoning Administrator the administrative duty to issue notices to ANCs.

11. On or about December 18, 1985, ANC 3C received a two-page list of building permits applied for and issued between December 2, 1985, and December 6, 1985. Al-

though this list is not a model of clarity, on its face it distinguishes applications for permits from approved building permits in several ways: by designating all applications with the letter "A", followed by a number, and designating all issued permits with the letter "B", followed by a number; by the information set forth in the "remarks" column; and by listing the issued permits first, ahead of all the applications.

12. The distinctions set forth in Finding of Fact No. 11, with respect to issued permits and permit applications, are more than adequate for any person with an interest in proposed construction to become informed about the significance of those distinctions, and to thereby know when an application is pending.

13. In light of the statutory duties of ANCs, as well as the particular interest of ANCs, including ANC 3C, in land use and construction, the Board finds that the notice received on December 18, 1985 provided ANC 3C with actual notice that a permit to construct a new building at 4000 Wisconsin Avenue had been applied for, but not issued.

14. The Board did not admit into evidence Applicant's Exhibit 18G, a notice form which was issued on April 21, 1986, and which reflects revisions in the form. Moreover, the revision of the notice documents which apparently was effected in April, 1986, does not demonstrate that the previous form was inadequate, particularly to the experienced ANC Commissioners to whom it was sent.

15. D.C. Code section 1-261(c)(3) directs the Department of Consumer and Regulatory Affairs to send each ANC a current list of applications for construction and demolition in the ANC. It does not charge the Department to send a current list of granted applications. The Board therefore is of the view that if an ANC in fact believed, long before December 18, 1985, that it was receiving a list of approvals, but not of applications, it

would be reasonable to expect that the ANC would have taken action to correct the situation.

16. If ANC 3C had commented on the permit application before it was approved for compliance with the Zoning Regulations, the ANC "would have offered [the Zoning Administrator] a very detailed traffic study . . ." and the ANC's "interpretation of how this building is in violation of the Comprehensive Plan."

17. On May 23, 1986, the Acting Director of the Department of Consumer and Regulatory Affairs vacated the suspension of the permits to pave portions of Upton Street and the Glover Archbold Parkway. The permits had been suspended on February 7, 1986, and were reinstated to their full authority on May 23, 1986.

18. On the basis of all of the facts and circumstances surrounding the suspension of the street paving permits, it was reasonable for the Zoning Administrator to determine that the suspension did not require a withholding or recision of the decision that the proposed building would comply with 11 DCMR 2117.4.

CONCLUSIONS OF LAW AND OPINION:

A. Procedural Matters

After considering arguments of counsel on the motion of the 4000 Wisconsin Avenue Associates to dismiss the appeal for lack of jurisdiction and motions, the Board, through the Chairperson, ruled as follows:

1. The Board does not have jurisdiction to address the issue of inconsistency of the proposed development with the comprehensive plan. Responsibility for comprehensive plan consistency issues is vested in the Zoning Commission. The Board declined appellant's proffer of evidence on this issue, on the ground that the appellants' previous submissions

are fully sufficient to identify the appellant's position on this issue, and to enable the Board to determine its lack of jurisdiction.

2. The Board would hear evidence on the issue whether the building permit is invalid because it was issued at a time when the permit to pave the streets was suspended, and arguably there was therefore no basis for concluding that parking and loading requirements could be satisfied.

3. The Board ruled that it would hear evidence on the issue whether the ANC received notice of the building permit application from the Department of Consumer and Regulatory Affairs. The Board heard this evidence in order to determine whether it has jurisdiction to address the issue, and if it does, to address it.

B. The Merits

1. Permits numbered B311718 and B312557 were not issued under the authority of the Zoning Administrator, and the administrative decision whether or not to issue them is not governed by the Zoning Regulations. The Board lacks jurisdiction to address the validity of those permits.

2. The suspension of the street paving permits did not nullify the validity of the Zoning Administrator's decision that the proposed building would comply with 11 DCMR 2117.4, nor cause the issuance of Permit numbered B312556 to violate that provision.

3. The issue of notice to the ANC is not within the Board's jurisdiction.

4. Alternatively, the Zoning Administrator did not approve Permit numbered B312556 in violation of the notice requirements of D.C. Code 1-261(c). ANC 3C received actual notice of the pendency of the application for a building permit. Moreover, the

issues and concerns which ANC 3C would have presented to the Zoning Administrator would not have been germane under Title 11, DCMR. The Zoning Administrator could not have disapproved the proposed building on the basis of the ANC's issues and concerns about traffic and the Comprehensive Plan.

5. As to the issues and concerns of ANC 3C in this proceeding, the Board concludes that it has complied with the requirement to give great weight to those issues and concerns throughout this order.

6. Neither the Zoning Administrator nor this Board may disapprove a matter-of-right development on the basis of allegedly excessive traffic impact. The Board has no jurisdiction in this appeal over traffic issues or concerns which are not within the scope of Title 11, DCMR.

7. The Zoning Commission for the District of Columbia has the statutory duty to insure that the Zoning Regulations are not inconsistent with the Comprehensive Plan. The Land Use Element of the Comprehensive Plan was enacted in March, 1985, ten years after the installation of the elected Mayor and Council of the District of Columbia. Just as it was reasonable for the Executive and Legislative branches to take the time which they determined to be reasonably required to prepare and adopt the Comprehensive Plan, so also is it reasonable for the Zoning Commission to determine a reasonable schedule for the conduct of its business. The Board may not exercise oversight over the Commission in that respect. Further, the Zoning Commission is the only body which may amend the Zoning Regulations, including those provisions which govern matter-of-right developments.

8. Whether or not the developers of 4000 Wisconsin Avenue at any time misrepresented the status of the project is not germane to the issues which are within the jurisdiction of this Board.

Accordingly, it is ORDERED that the appeal is DENIED and the decision of the Zoning Administrator is UPHELD.

VOTE: 4-0-1 (Maybelle T. Bennett, Charles N. Norris, William F. McIntosh, and Carrie L. Thornhill, to deny and uphold; Paula L. Jewell, not voting, abstaining).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: /s/ Edward L. Curry
EDWARD L. CURRY
Acting Executive Director

FINAL DATE OF ORDER: Apr. 10, 1987

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 203(a) of the Home Rule Act provides:

Subsections (a) and (b) of section 2 of the Act entitled "An Act providing for a comprehensive development of the park and playground system of the National Capital", approved June 6, 1924 (D.C. Code, sec. 1-1002), are amended to read as follows:

"(a)(1) The National Capital Planning Commission (hereinafter referred to as the 'Commission') is created as the central Federal planning agency for the Federal Government in the National Capital, and to preserve the important historical and natural features thereof, except with respect to the United States Capital buildings and grounds as defined in sections 1 and 16 of the Act of July 31, 1946 (40 U.S.C. 193a, 193m), and to any extension thereof or additions thereto, or to buildings and grounds under the care of the Architect of the Capitol.

"(2) The Commissioner of the District of Columbia (hereinafter referred to as the 'Commissioner') shall be the central planning agency for the government of the District of Columbia (hereinafter referred to as the 'District') in the National Capital. The Commissioner shall be responsible for coordinating the planning activities of the District government and for preparing and implementing the District elements of the comprehensive plan for the National Capital, which may include land use elements, urban renewal and redevelopment elements, a multiyear program of public works for the District, and physical, social, economic, transportation, and population elements. The Commissioner's planning responsibility shall not extend to Federal or international projects and developments in the District, as determined by the Commission, or to the United States Capitol buildings and

grounds as defined in sections 1 and 16 of the Act of July 31, 1946 (40 U.S.C. 193a, 193m), or to any extension thereof or additions thereto, or to buildings and grounds under the care of the Architect of the Capitol. In carrying out his responsibility under this section, the Commissioner shall establish procedures for citizen participation in the planning process, and for appropriate meaningful consultation with any State or local government or planning agency in the National Capital region affected by any aspect of a comprehensive plan (including amendments thereto) affecting or relating to the District.

"(3) The Commissioner shall submit each District element of the comprehensive plan and any amendment thereto, to the Council for revision or modification, and adoption, by act, following public hearings. Following adoption and prior to implementation, the Council shall submit each such element or amendment to the Commission for review and comment with regard to the impact of such element or amendment on the interests or functions of the Federal Establishment in the National Capital.

"(4) (A) The Commission shall, within sixty days after receipt of such a District element of the comprehensive plan, or amendment thereto, from the Council, certify to the Council whether such element or amendment has a negative impact on the interests or functions of the Federal Establishment in the National Capital. If within such sixty days the Commission takes no action with respect to such element or amendment, such element or amendment shall be deemed to have no such negative impact, and such element or amendment shall be incorporated into the comprehensive plan for the National Capital and shall be implemented.

"(B) If the Comission finds, within such sixty days, such negative impact, it shall certify its findings and recommendations with respect to such negative impact to

the Council. Upon receipt of the Commission's findings and recommendations, the Council may—

"(i) reject such findings and recommendations and resubmit such element or amendment, in a modified form, to the Commission for reconsideration; or

"(ii) accept such findings and recommendations and modify such elements or amendment accordingly.

If the Council accepts such findings and recommendations and modifies such element or amendment under clause (ii), the Council shall submit such element or amendment to the Commission for it to determine whether such modification has been made in accordance with the Commission's findings and recommendations. If, within thirty days after receipt of the modified element or amendment, the Commission takes no action with respect to such element or amendment, it shall be deemed to have been modified in accordance with such findings or recommendations, and shall be incorporated into the comprehensive plan for the National Capital and shall be implemented. If within such thirty days, the Commission again determines such element or amendment to have a negative impact on the functions or interests of the Federal Establishment in the National Capital such element or amendment shall not be implemented.

"(C) If the Council rejects the findings and recommendations of the Commission and resubmits a modified element or amendment to it under clause (i), the Commission shall, within sixty days after receipt of such modified element or amendment from the Council, determine whether such modified element or amendment has a negative impact on the interests or functions of the Federal Establishment within the National Capital. If the Commission finds such negative impact it shall certify its findings (in sufficient detail that the Council can understand the basis of the objection of the Commission) and recommendations to the Council, and such element or amendment shall not be implemented. If the Commission

takes no action with respect to such modified element or amendment within such sixty days, such modified element or amendment shall be deemed to have no such negative impact and shall be incorporated into the comprehensive plan and it shall be implemented. Any element or amendment which the Commission has determined to have a negative impact on the Federal Establishment in the National Capital, and which is submitted again in a modified form not less than one year from the day it was last rejected by the Commission shall be deemed to be a new element or amendment for purposes of the review procedure specified in this section.

"(D) The Commission and the Commissioner shall jointly publish from time to time as appropriate, a comprehensive plan for the National Capital, consisting of the elements of the comprehensive plan for the Federal activities in the National Capital developed by the Commission, and the District elements developed by the Commissioner and the Council in accordance with the provisions of this section.

"(E) The Council may grant, upon request made to it by the Commission, an extension of any time limitation contained in this section.

"(F) The Commission and the Commissioner shall jointly establish procedures for appropriate meaningful continuing consultation throughout the planning process for the National Capital.

2. Section 423 of the Home Rule Act provides:

(a) The Mayor shall be the central planning agency for the District. He shall be responsible for the coordination of planning activities of the municipal government and the preparation and implementation of the District's elements of the comprehensive plan for the National Capital which may include land use elements, urban renewal and redevelopment elements, a multi-year program of municipal public works for the District, and physical, social, economic, transportation, and population elements. The Mayor's planning responsibility shall not

extend to Federal and international projects and developments in the District, as determined by the National Capital Planning Commission, or to the United States Capitol buildings and grounds as defined in sections 1 and 16 of the Act of July 31, 1946 (40 U.S.C. 193a, 193m), or to any extension thereof or addition thereto, or to buildings and grounds under the care of the Architect of the Capitol. In carrying out his responsibilities under this section, the Mayor shall establish procedures for citizen involvement in the planning process and for appropriate meaningful consultation with any State or local government or planning agency in the National Capital region affected by an aspect of a proposed District element of the comprehensive plan (including amendments thereto) affecting or relating to the District.

(b) The Mayor shall submit the District's elements and amendments thereto, to the Council for revision or modification, and adoption by act, following public hearings. Following adoption and prior to implementation, the Council shall submit such elements and amendments thereto, to the National Capital Planning Commission for review and comment with regard to the impact of such elements or amendments on the interests and functions of the Federal Establishment, as determined by the Commission.

(c) Such elements and amendments thereto shall be subject to and limited by determinations with respect to the interests and functions of the Federal Establishment as determined in the manner provided by Act of Congress.

3. Section 492(a) of the Home Rule Act amends D.C. Code § 5-412(e) as follows:

"The Zoning Commission shall exercise all the powers and perform all the duties with respect to zoning in the District as provided by law."

4. Section 492(b) of the Home Rule Act amends D.C. Code § 5-413, *et seq.* as follows:

The Act of June 20, 1938 (D.C Code, sec. 5-413, et seq.) is amended as follows:

1) The first sentence of section 2 of such Act (D.C. Code, sec. 5-414) is amended by striking out "Such regulations shall be made in accordance with a comprehensive plan and" and inserting in lieu thereof "Zoning maps and regulations, and amendments thereto, shall not be inconsistent with the comprehensive plan for the National Capital, and zoning regulations shall be".

5. D.C. Code § 1-245 provides:

It is hereby declared that:

(1) The District of Columbia has prepared, through an exhaustive process of research, analysis, and review, including citizen involvement and consultation with affected federal, state and local governments, and planning agencies in the National Capital region, District elements of a 20-year Comprehensive Plan for the National Capital as required by § 1-2002(a) and by § 1-244(a).

(2) Ten District elements of the Comprehensive Plan for the National Capital are contained in this act: General Provisions; Economic Development; Housing; Environmental Protection; Transportation; Public Facilities; Urban Design; Preservation and Historic Features; Downtown; and Human Services.

(3) The District elements of the Comprehensive Plan for the National Capital contained in this act do not extend to any federal or international projects and developments, or to the United States Capitol buildings and grounds, or to any buildings and grounds under the care of the Architect of the Capitol.

(b) The purposes of the District elements of the Comprehensive Plan for the National Capital are to:

(1) Define the requirements and aspirations of District residents, and accordingly influence social, economic and physical development;

(2) Guide executive and legislative decisions on matters affecting the District and its citizens;

(3) Promote economic growth and jobs for District residents;

(4) Guide private and public development in order to achieve District and community goals;

(5) Maintain and enhance the natural and architectural assets of the District; and

(6) Assist in the conservation, stabilization, and improvement of each neighborhood and community in the District.